IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76- 76-1105

RAMSEY CLARK,

Appellant ~~Petitioner~~,

and

UNITED STATES OF AMERICA,

Intervenor,

v.

FRANCIS R. VALEO, *et al.*,

Appellees ~~Respondents~~.

JURISDICTIONAL STATEMENT ON APPEAL FROM, ~~AND PETITION FOR WRITS OF CERTIORARI TO~~, THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ~~AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA~~

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Ramsey Clark, a plaintiff below, appeals from the judgments of the United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, and the three-judge District Court for the District of Columbia in these two virtually identical cases. In the alternative, Ramsey

Clark petitions for writs of certiorari to review the aforementioned judgments. Both courts below declined to resolve the issue of the constitutionality of the one-house Congressional veto because of their determinations that the issue is not ripe and that judicial prudence dictates abstention.

The merits of the one-house veto issue affect not only the operation of the Federal Election Commission, but also bear upon the validity of numerous other statutes containing similar provisions, as well as several bills and proposals under active consideration, including President Carter's plans for a major reorganization of the Executive branch. Because of the need for a prompt resolution of the important questions presented, plaintiff urges this Court to review not only the lower courts' ripeness determinations, but also to resolve the purely legal question of the constitutionality of the one-house veto, based upon the full record which the parties prepared in the district court. Such a procedure was followed in *Buckley v. Valeo,* 424 U.S. 1, 109-43 (1976), where the same court of appeals found an analogous issue relating to the composition of the Federal Election Commission to be unripe, but this Court reversed that ruling and struck down the statute as violative of separation of powers principles.

OPINIONS BELOW

The order of the district court (App. I at 52a) including findings of fact, which certified five constitutional questions to the court of appeals, has not been reported.[1]

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[1] "App. __ at ____" refers to the designated volume and page, respectively, of the three-volume Appendix submitted herewith.

The opinion of the *en banc* court of appeals with concurring and dissenting opinions (App. II at 1-119) has not yet been reported. The judgment of the three-judge district court (App. I at 79a) in the portion of the case not certified to the court of appeals has not been reported.

JURISDICTION

The Federal Election Campaign Act, 2 U.S.C. § 437h(b), provides that:

> Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States.

Accord, 26 U.S.C. § 9011(b)(2). It is further provided in 2 U.S.C. § 437h(c) that:

> It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a).

Although the court of appeals stated that it was not deciding the questions certified by the district court (App. II at 10), it in fact did decide the first question, which was whether an action brought by a voter and candidate to challenge the constitutionality of an election law, under statutory provisions providing for immediate review at the request of any voter, met the Article III "case or controversy" requirement (App. II at 10; *see* App. II at 8 n.2 and App. I at 53a). In order to eliminate any uncertainty concerning the proper method of seeking review, plaintiff Clark requests that these appeals also be treated as petitions for writs of certiorari. 28 U.S.C. § 2103.

The judgment of the court of appeals was entered on January 21, 1977 (App. II). A timely notice of appeal was filed in the court of appeals on February 7, 1977 (App. I at 10a). The jurisdiction of this Court on appeal from that judgment is invoked under 2 U.S.C. § 437h(b). *See Buckley v. Valeo,* 424 U.S. 1, 10 n.6 (1976). The jurisdiction of this Court on the petition for a writ of certiorari to the court of appeals is invoked under 28 U.S.C. § 1254(1).

The judgment of the three-judge district court was entered on January 21, 1977 (App. I at 79a). A timely notice of appeal was filed in the district court on February 7, 1977 (App. I at 13a). The jurisdiction of this Court on appeal from that judgment is invoked under 26 U.S.C. § 9011(b)(2), and 28 U.S.C. § 1253. *See Buckley v. Valeo, supra,* 424 U.S. at 10 n.6. The jurisdiction of this Court on the petition for a writ of certiorari to the district court is invoked under 28 U.S.C. §§ 1254(1) and 1651. *See United States v. Nixon,* 418 U.S. 683, 686-87 (1974) (and cases cited in note 1 thereof).

STATUTES INVOLVED

The Federal Election Campaign Act, 2 U.S.C. §§ 431, *et seq.*, as amended, (hereinafter the "FECA") and Subtitle H of the Internal Revenue Code of 1954, 26 U.S.C. §§ 9001, *et seq.*, as amended, (hereinafter "Subtitle "H") are fully set forth in volume III of the Appendix submitted herewith. The specific provisions of those statutes which are challenged here as unconstitutional are those providing that a single House of Congress may disapprove regulations of the Federal Election Commission. 2 U.S.C. § 438(c); 26 U.S.C. §§ 9009(c) and 9039(c) (App. III at 32-34; 63-64; 77).

QUESTIONS PRESENTED

The following constitutional questions, which were certified to the court of appeals pursuant to the procedure established by 2 U.S.C. § 437h(a) (App. III at 30), are the questions appellant-petitioner brings to this Court.

1. Does this action challenging the constitutionality of § 315(c) of the Federal Election Campaign Act (FECA), 2 U.S.C. § 438(c), and §§ 9009(c) and 9039(c) of Subtitle H of Internal Revenue Code of 1954, 26 U.S.C. §§ 9009(c) and 9039(c), present a justiciable case or controversy under Article III of the United States Constitution?

2. Do 2 U.S.C. § 438(c), and 26 U.S.C. §§ 9009(c) and 9039(c), which allow a single House of Congress to disapprove rules and regulations, or selected portions thereof, adopted by the Federal Election Commission, violate the principles of separation of powers and checks and balances established by Articles I, II, and III of the Constitution; are they in derogation of the Presidential veto power in Article I of the Constitution; and are they in excess of the legislative powers enumerated in Article I of the Constitution?

3. Do the challenged provisions specified in questions one and two violate the right of a candidate for Federal office to Due Process of Law under the Fifth Amendment of the United States Constitution by: a) depriving him of the right to have laws affecting him enacted by the full legislative process, including passage by both Houses of Congress with the opportunity for a Presidential veto; and, b) invidiously discriminating against him in allowing incumbent officeholders, but not challengers, to veto rules and regulations of the Commission?

4. Do the challenged provisions violate the Constitution by delegating the discretion to disapprove regulations of the Federal Election Commission to a single House of Congress without fixing any standards or criteria to govern the exercise of such discretion and without requiring any statement of reasons for the exercise of such discretion?

5. Do the challenged provisions, by allowing a single House of Congress to disapprove rules and regulations, or selected portions of such rules and regulations, adopted by the Federal Election Commission, create an extra-Constitutional legislative process in violation of Article I?

STATEMENT

This action challenges the constitutionality of election statutes which permit a single House of Congress to veto regulations adopted by an independent agency, the Federal Election Commission (the "Commission"). 2 U.S.C. § 438(c); 26 U.S.C. §§ 9009(c) and 9039(c). This issue was argued, but not decided, in *Buckley v. Valeo*, 424 U.S. 1 (1976), because of this Court's ruling that the Commission as then constituted transgressed principles of separation of powers. Since the Commission could therefore not issue any rules, the necessity for deciding whether such rules could be vetoed by one House of Congress was obviated. *Id.* at 140 n.176. However, the Commission has now been reconstituted as an Executive agency, its rulemaking powers have been continued, and the question of whether the one-house veto violates separation of powers principles cannot be avoided.

A. Background

The 1974 statute establishing the Federal Election Commission also created a vast array of complex reporting requirements and imposed stringent spending and contribution limitations. It was plain that the law was not entirely self-explanatory and that candidates, political committees, and the public at large needed regulations to fill in the gaps. In the nearly two years since the Commission began operations, it has made every effort to issue these badly needed regulations, but has, to date, been unsuccessful, largely because of the intercession of two separate one-house vetoes and the extensive delays resulting from the necessity felt by the Commission to negotiate the substance of any regulations with relevant Congressional committees prior to transmittal to Congress.

The first regulations that the Commission sought to put into effect were those dealing with office accounts of federal officeholders, including Members of Congress. On July 30, 1975, the Commission sent to Congress rules that would have required the disclosure of contributions to, and expenditures from, office accounts of federal officeholders, including excess campaign funds (Stip. ¶¶ 22-24, App. I at 60a-61a).[2] The proposal evoked an immediate negative response from affected Members of Congress (Stip. ¶ 25, App. I at 61a). Thereafter, Commission hearings were held, the regulations were redrafted, and on September 30, 1975, a modified version was transmitted to Congress (Stip. ¶¶ 26, 28-31, App. I at 61a-62a).

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[2] "Stip. ¶__" refers to the designated paragraph in the Stipulation as to Findings of Fact dated September 2, 1976, and certified to the court of appeals in the district court's certification Order of September 3, 1976.

Yet, when the proposal came to the Senate floor, a proposal to approve the modified version of the office accounts regulation – *i.e.*, to require Members of Congress running for re-election to disclose their office accounts – failed by a single vote. Thereafter, both versions of the FEC's regulation were vetoed by a voice vote (Stip. ¶35, App. I at 62a).

The only other regulations on which either House of Congress has ever taken action – those relating to the place of filing of campaign reports and statements respecting Congressional elections – were also defeated, this time by the House (Stip. ¶¶36, 40, App. I at 63a). Those regulations, which were originally transmitted on August 1, 1975, would have required campaign reports to be filed initially with the Commission, rather than with the House and Senate as most Members of Congress preferred (Stip. ¶¶40, 41, App. I at 63a). While the matter was pending before Congress, Wayne Hays, then chairman of the House Administration Committee, met with Thomas Curtis, then chairman of the Commission, to discuss the document-filing regulations (Stip. ¶¶38, 39, App. I at 63a). It was later reported to the House of Representatives that they discussed "a compromise revision," sought to establish a "working relationship between the Commission and the Congress," and recognized the need to consult in advance of transmittal to "permit compromise to occur and legitimate concerns to be raised before the 30-day clock starts ticking." 121 Cong. Rec. H 10186 (daily ed. October 22, 1975). However, an agreement on a revision was apparently not reached, and on October 22d, the House accepted the recommendation of the Hays Committee and voted to disapprove the document-filing regulations (Stip. ¶40, App. I at 63a).

In December 1975 and January 1976 additional regulations were transmitted by the Commission to Congress (Stip. ¶42, App. I at 64a), but the statutory periods had not expired on January 30 (Stip. ¶44, App. I at 64a), when this Court handed down *Buckley v. Valeo,* holding, *inter alia,* that the Commission as then constituted was unconstitutional because its members were not all appointed in accordance with Article II, § 2, cl. 2 of the Constitution. The Congress subsequently recreated the Commission as an independent Executive agency, but left the one-house veto provision intact (Stip. ¶¶46-47, App. I at 65a).[3]

On May 26, 1976, the Commission published a comprehensive set of proposed regulations encompassing matters such as disclosure of contributions, limitations on both spending and contributions, corporate and union political activity, matching funds to candidates in Presidential primaries, convention funding, and compliance procedures, as well as rules dealing with office accounts and document-filing on which earlier regulations had been vetoed (Stip. ¶48, App. I at 65a). There was a comment period, during which the Commission heard oral testimony and accepted written submissions from the public (Stip. ¶¶53-59, App. I

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[3] The 1976 amendments altered the Congressional veto provision in two respects to tighten Congressional control over the Commission. First, section 438(c)(5) was added to make clear that either House could disapprove any portion of a rule which that body concluded was a "single separable rule of law." Second, the 1976 amendments extended the scope of the veto provisions to advisory opinions of general applicability, including those previously issued. *See* 2 U.S.C. § 437f(a) and § 108(b), Pub. L. 94-283, 90 Stat. 482, *reproduced following* 2 U.S.C. § 437f(c).

at 67a). By June 25th the Commission had reached a number of decisions, tentatively approving some regulations, sending others back to the staff for further drafting, and deferring decisions on others (Stip. ¶61, App. I at 68a). As a result, the Commission was then in a position to cite these decisions to the public as its current thinking on questions which were vitally affecting the campaigns then in progress; it could not, however, hold them out as Commission regulations because they had not yet been sent to Congress for the required time (Stip. ¶62, App. I at 68a-69a).

At the Commission's July 8th meeting, further discussions took place concerning the schedule for sending the regulations to Congress for the thirty-legislative-day consideration period. It was concluded that pre-transmittal Congressional consultation was necessary, but that, because key Congressional aides were then away at the Democratic Convention, no meeting with Congressional staffs could be held until July 21st (Stip. ¶64, App. I at 69a). In fact, those meetings were delayed until July 27 and 28 and then on July 29 and 30 the Commission met and approved the final regulations (Stip. ¶¶65-67, 77, App. I at 70a-71a). While not all of the Congressional suggestions were adopted, several were (Stip. ¶¶68-73, App. I at 70a-71a). Among the adopted amendments was one relating to office accounts, which reduced the number of times per year that reports had to be filed, and changed the date of filing to relieve Members of Congress from alleged burdens (Stip. ¶¶74-76, App. I at 71a).

On August 3, 1976, the Commission transmitted to Congress the comprehensive regulations first proposed in late May, along with other regulations governing the general Presidential election which had also been approved

in late July (Stip. ¶¶77-80, App. I at 71a-72a). However, even though these regulations were never vetoed, they have not become effective because thirty "legislative" days – *i.e.*, days on which both the House and Senate were in session[4] – did not pass prior to the October adjournment of the Congress *sine die*. Thus, the entire 1976 election passed without any implementing regulations. Moreover, since the legislative clock commenced anew with a new Congress, regulations which have again been transmitted to Congress must lie for a full thirty legislative days before they can be made effective, if not vetoed. *See* 123 Cong. Rec. S 1802-03 (daily ed. Jan. 31, 1977). Only time will tell whether they will become effective in time for the special elections to fill the House seats of the three Members who have resigned to take positions in the Executive branch.

B. Proceedings Below

The complaint in this action was filed on July 1, 1976, by plaintiff Clark, a voter and then candidate for the Democratic nomination for United States Senator from the State of New York. The defendants, the Secretary of the Senate, the Clerk of the House, and the Federal Election Commission, had also been the defendants in *Buckley v. Valeo, supra*. On August 27th, the United States was allowed to intervene permissively in support of plaintiff's position that the Congressional veto is unconstitutional. On September 2d, a stipulation of facts, prepared by the parties and consisting of 81 paragraphs, was presented to the district court, along with a proposed order certifying five constitutional

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[4] 2 U.S.C. §438(c)(4); 26 U.S.C. §§ 9009(c)(3) and 9039(c)(3).

questions to the court of appeals for its consideration. The following day, the stipulation was adopted by the trial court as its findings, and a slightly modified version of the certification order was signed and filed (App. I at 52a-55a). A request for the convening of a three-judge district court was also entered. That same afternoon the court of appeals, noting the impending New York primary on September 14th, issued an order establishing an accelerated briefing schedule and setting oral argument for September 10th.

Both plaintiff Clark and the United States extensively briefed each of the five certified questions, but the defendants chose to brief only the first – justiciability. Defendants Valeo and Henshaw later filed *amicus curiae* briefs on the merits of the one-house veto issue in two other cases, but they declined to submit them in this case.[5]

The *en banc* court of appeals and the three-judge district court sat together to hear oral arguments as scheduled, but it was more than four months later before the courts issued their decisions. The court of appeals issued a per curiam opinion, three concurring opinions, and two dissenting opinions totaling 119 pages in all (App. II). The three-judge court simply expressed agreement with the result reached by the majority of the court of appeals (App. I at 79a-80a). By a vote of 5 to 2, the appellate court held that this case does not present an Article III "case or controversy" because "the unripeness of the action is so pervasive" (App. II at 10). The per

[5] *McCorkle v. United States*, No. 76-1479 (4th Cir.); *Atkins v. United States*, Nos. 41-76, *et seq.* (Ct. Cl.). *See* note 18, *infra*.

curiam opinion indicated that there could be no ripe controversy at least until there was a one-house veto of regulations of the reconstituted Commission (App. II at 15-16). Although the court was aware that two regulations had already been vetoed (App. II at 24), it apparently viewed the injury resulting from those one-house vetoes as insufficient to create a ripe controversy because those were regulations of a "legislative" Commission, rather than an "executive" Commission (*see* App. II at 15, 24). Although plaintiff Clark had alleged a present injury resulting from *pre*-transmittal delay caused by the Commission's consultations with House and Senate staffs over the substance of these regulations in order to avoid a veto, the per curiam opinion did not consider that injury, but addressed a different question – whether cognizable injury resulted from *post*-transmittal delay in Congress. This latter question the majority answered in the negative on the grounds that *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), had upheld the constitutionality of "lying-over" periods (App. II at 12-15).

The majority further stated that plaintiff Clark had "identified no proposed regulation tainted by the threat of veto on review" (App. II at 11), and that the United States had not claimed that the regulations were "tainted with political interference" (App. II at 12). Although both plaintiff Clark and the United States relied heavily upon this Court's ripeness ruling in *Buckley* on the issue of the composition of the Commission, the per curiam opinion relegated that case to an appendix, where it concluded that "it seems fair to say that the separation of powers questions inherent in Section 438(c) were more starkly presented by the facts obtaining in *Buckley* when the [Supreme] Court considered it" (App. II at 24). Thus, according to the court of appeals, this Court's

decision in *Buckley* not to resolve the one-house veto issue supported a refusal to resolve it in this case also. *Id.* Finally, the majority below held that even if this case did present an Article III case or controversy, the court "would nevertheless refuse to reach the merits of the unicameral veto under the doctrine of judicial prudence enunciated in *Samuels v. Mackell*, 401 U.S. 66, 73 (1973)" (App. II at 16-17 n.10).[6]

Judge Wilkey concurred in the result reached in the per curiam opinion, but did not join the opinion (App. II at 18). A separate concurrence by Judge Tamm, joined by Judges Bazelon and Wright, expressed the view that the United States lacked independent standing to challenge the actions of one branch of the Government as an unconstitutional invasion of the powers of another branch (App. II at 27-35). In a third concurrence, Judge Leventhal expressed the view that he would have preferred to decide the case on the non-constitutional ground that it lacked ripeness because of prudential considerations (App. II at 36-51), and suggested that the constitutionality of the one-house veto might turn on the reasons for a particular veto (App. II at 38-41).

In the two lengthy dissents, Judges Robinson and MacKinnon each concluded that plaintiff Clark had standing as a voter (App. II at 73-76, 83-97) and that the case was ripe for adjudication (App. II at 54-72, 83-86). Moreover, Judge MacKinnon expressed the opinion that plaintiff Clark's standing as a candidate was not mooted by his failure to be elected, since the case is "capable of repetition,

[6] *Samuels*, a companion case to *Younger v. Harris*, 401 U.S. 37 (1973), was a case in which this Court determined that for reasons of federalism, Federal district courts should not interfere with ongoing State criminal prosecutions by issuance of declaratory relief.

yet evading review" (App. II at 109-11 n.21). Finally, Judge MacKinnon alone reached the merits of the constitutional challenge to the one-house veto provision, declaring that it subverted "the constitutional legislative process" and violated the Presidential veto provisions of Article I, § 7, cl. 3 (App. II at 109).

THE QUESTIONS ARE SUBSTANTIAL, AND SO THIS COURT SHOULD SET THE CASE FOR ARGUMENT AS EXPEDITIOUSLY AS POSSIBLE.

This case raises issues of fundamental importance left undecided by this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), issues which are at the heart of our tripartite form of government as embodied in the principles of separation of powers and checks and balances. The Congressional veto provisions challenged here are typical of dozens of others which are contained in a variety of statutes and which are proposed to be extended to all regulations of the entire Executive branch. *See* p. 31, *infra*. If upheld, these statutes would fundamentally alter the balance of power in our Government by permitting a single House of Congress, acting without any role for the other House or the President, to write its own laws and effectively frustrate implementation of entire legislative enactments.

The court below recognized that this issue is "momentous" (App. II at 16), and voiced agreement with the Justice Department's characterization of this case as a "continuation of a dispute of major constitutional proportions which has been brewing for forty years" (*id.*). It was also aware that Congress recognized the serious constitutional questions raised by this regulatory system, and that

Congress had sought to insure that there would be an immediate and certain resolution of constitutional challenges. 2 U.S.C. §437h. Nonetheless, the court of appeals declined to reach the merits of the controversy. Because the court below erred in failing to follow this Court's ruling of last Term in *Buckley* on precisely the same ripeness issue, and because the legal issue presented by the one-house veto needs no further development, but does need prompt resolution, plaintiff Clark urges this Court to note probable jurisdiction, or to grant writs of certiorari, on all questions presented. The parties have made as complete a record as they desired, and the time is now for the adjudication of the constitutionality of the one-house veto.

I. THE COURT BELOW MISCONSTRUED THIS COURT'S RULING IN *BUCKLEY*, AND ERRED IN REFUSING TO FOLLOW AN EXPLICIT CONGRESSIONAL COMMAND TO EXERCISE ITS JURISDICTION.

In enacting the Federal Election Campaign Act, Congress was aware that the Act raised many important constitutional questions requiring prompt resolution in order to effectively implement the badly needed election reforms embodied in the Act. For this reason, Congress included sections in both the FECA and Subtitle H, requiring the courts to resolve all constitutional challenges as expeditiously as possible.[7] However, the court below refused to acceed to the congressional command to exercise its

[7] 2 U.S.C. § 437h(a); 26 U.S.C. § 9011(b). Senator Buckley stated during the debate on the Election Act:

(continued)

jurisdiction at the behest of any voter and dismissed on the grounds of ripeness and judicial prudence. In so doing, the court rendered a decision which is directly in conflict with this Court's holding in *Buckley v. Valeo, supra*, a case construing the very same statute at issue here, but which the court of appeals' per curiam opinion discussed only in an appendix.

In *Buckley*, several plaintiffs, including individual voters and a candidate for the Senate in New York, called upon the court of appeals to decide the merits of a large number of constitutional questions arising under the 1974 amendments to the election laws. Although resolving most of those issues, the court of appeals expressly declined to rule on whether the method by which the Commission was appointed violated principles of separation of powers, relying on the same ripeness grounds that it used here in refusing to reach the merits. *Buckley v. Valeo*, 519 F.2d 831, 891-97 (1975). This Court, however, disagreed with that ruling, found the question to be justiciable, and concluded that the Commission had been unconstitutionally appointed. *Buckley v. Valeo, supra*, 424 U.S. at 109-43. This Court then turned to the question of whether the one-house veto was constitutional, but declined to decide that issue because of "our holding that the manner of appointment of the members of the Commission precludes them from

[7] (continued)

. . . if, in fact, there is a serious question as to the constitutionality of this legislation, it is in the interest of everyone to have the question determined by the Supreme Court at the earliest possible time. [120 Cong. Rec. 10562 (April 10, 1974)].

exercising the rulemaking powers in question . . . ." *Id.* at 140 n.176. This was certainly a reasonable course since Congress might well have re-evaluated the one-house veto in light of the holding in *Buckley*, and since the parties and numerous *amici curiae* had cumulatively devoted only about four pages of their briefs to this far-reaching issue.[8] Nonetheless, Justice White considered the one-house veto question to be sufficiently ripe and sufficiently important to discuss it in his separate opinion. *Id.* at 282-86.

In this case, a voter and candidate for the Senate in New York again challenges the constitutionality of the one-house veto provision, an issue that is now timely since the Election Commission has been reconstituted with rulemaking powers. However, the D.C. Circuit has once again held that the issue is not ripe. Essentially, the majority below ruled that, absent an actual veto of regulations of the reconstituted Election Commission (there were two vetoes of regulations of the former "legislative" agency), Ramsey Clark as a voter had no "personal stake" in the outcome (App. II at 11) and no ripe controversy existed. Thus, while phrasing its dismissal in terms of ripeness, the majority focused on issues generally associated with standing, and held that a voter seeking redress of injuries inflicted by a Congressional interference with a supposedly independent, executive Commission regulating elections, failed both Article III and prudential justiciability tests, even though Congress has made a legislative determination that

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[8] *See* Brief of Appellants 208 n.9; Brief of the Attorney General as Appellee and the United States as *Amicus Curiae* 111-12 n.70; Brief of the Federal Election Commission 57-58 n.49; Reply Brief of the Appellants 112-13.

any voter does have the required personal stake. 2 U.S.C. § 437h(a); 26 U.S.C. § 9011(b)(1). In reaching this result, the majority misconstrued the test of justiciability under Article III and *Buckley*, and misconceived the nature of the injuries suffered by plaintiff Clark as both a voter and a candidate.[9]

This Court established in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), that Congress can create substantive rights and can confer standing to enforce those rights just as it did in the FECA and Subtitle H.[10] Thus, where actions by a plaintiff suing under congressional authorization would benefit the public, as is the case here, the power of Congress to confer such standing on "any person" has been upheld. *See Friends of the Earth v. Carey*, 535 F.2d 165, 172-73 (2d Cir. 1976). Moreover, this Court has held that a voter's interest in even a fraction of a vote is adequate to satisfy the requirements of Article III. *Baker v. Carr*, 369 U.S. 186 (1962). Therefore, the lower court's decision –

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[9] The majority below held that plaintiff's standing as a candidate was mooted during the pendency of this action because of his defeat in the New York primary. However, as Judge MacKinnon noted (App. II at 109-11 n.21), this case is "capable of repetition, yet evading review." *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969). The fact that plaintiff filed this suit on July 1, 1976, yet could not secure the first opinion in the case until January 21, 1977, bears out Judge MacKinnon's observation that, "[t]he normal period in most states between the close of primary filings for candidates and the date of the primary election is insufficient time within which to commence a suit and obtain a decision under normal trial and appellate procedures." App. II at 119. Indeed, the time has proved insufficient even under an extraordinarily short briefing and argument schedule.

[10] 2 U.S.C. § 437h(a); 27 U.S.C. § 9011(b)(1).

that neither a voter's personal stake in a fair election process, nor the public's stake represented by a voter authorized by Congress to sue, is sufficient to give the court jurisdiction – conflicts with fundamental decisions of this Court and threatens to invalidate numerous other statutes granting standing to any "person" or to any "citizen."[11]

In addition, this Court in *Buckley* did not require anything like the specificity in injury that the court of appeals has sought to require in the present case. Thus, in finding the composition of the Commission issue to be justiciable, this Court recognized a present injury to the voter and candidate plaintiffs, even though it was impossible to prove that Commissioners appointed by the Congress would ever vote differently from Commissioners appointed by the President. *See Buckley v. Valeo, supra,* 424 U.S. at 113-18. *See also Regional Rail Reorganization Act Cases,* 419 U.S. 102, 123-24, 138-45 (1974). The injury recognized in *Buckley* was a subtle, yet inevitable, interference with the workings of a coordinate branch of government. That same, subtle injury to the separation of powers is present here.

Moreover, plaintiff Clark has alleged three distinct, continuing injuries, which are supported by the record, and which directly result from the threat of the veto regardless of whether another veto ever occurs. First, if the office

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[11] There is a wide range of statutes granting standing to any person and their constitutionality has never been questioned. *See, e.g.,* Clean Air Act Amendments of 1970, 42 U.S.C. § 1857h-2; Noise Control Act, 42 U.S.C. § 4911; Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1365; Marine Protection, Research and Sanctuaries (Ocean Dumping) Act, 33 U.S.C. § 1415(g); Consumer Product Safety Act, 15 U.S.C. § 2073; Federal Informers Act, 31 U.S.C. § 232(B); and Freedom of Information Act, 5 U.S.C. § 552(a)(3) and (a)(4)(B).

accounts and document-filing regulations, which sought to ameliorate certain of the advantages of incumbency, had not been vetoed, the Commission would not have been forced to water them down to their present form. *See* Stip. ¶¶22-43, 74-77, App. I at 60a-64a, 71a. Second, voters and candidates alike have suffered from the delays resulting not from the "lying before Congress" provision of the Acts, but from the delays in sending regulations to Congress resulting from negotiations over the substance of the regulations with Congressional staff after the closing of the period for public commenting. Stip. ¶¶63-76, App. I at 69a-71a; App. II at 54-57 (Robinson, J., dissenting); App. II at 86-91 (MacKinnon, J., dissenting). The failure of any regulations to take effect can be traced directly to the extra month of delay caused by these negotiations. *Id.* Third, voters and candidates alike have been injured by the undue influence which the veto threat has allowed Members of Congress to exert over the substance of regulations, such as that concerning office accounts. *Id.* As stated by Judge MacKinnon, the only member of the court of appeals to have also served in Congress (App. II at 114):

> A great deal of the harm comes from the threat, the potential of a one-house veto. Indeed, if the system works the way plaintiffs allege, all either house of Congress would have to do is to influence the FEC's proposed regulations so that they always come out favorable [sic]. Then, piously, each house could refrain from any legislative action incanting, "If that's the way the FEC wants it, so be it." [footnote omitted].

The injury sought to be prevented by invalidation of the veto provision is unlikely to ever be more clearly docu-

mented than it is in the present case. Since Congress has directed that this Court exercise the full extent of its Article III jurisdiction to resolve disputes as to the constitutionality of the election laws, the one-house veto issue is ripe for decision by this Court at this time.

II. THE COURT SHOULD GRANT PLENARY CONSIDERATION TO THE CONSTITUTIONALITY OF THE ONE-HOUSE VETO.

A. The One-House Veto Is Unconstitutional.

The American constitutional system is one of affirmative grants of power: each of the three coordinate branches is limited to those powers delegated to it. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). In Article I, the Constitution explicitly delegates the lawmaking role to the Congress, comprised of the Senate and the House of Representatives, working in conjunction with the President. Nowhere in that Article, or in any other place in the Constitution, is the Congress given any power to issue rules and regulations implementing the statutes that it has enacted. Nor is there any specific provision allowing the Congress to exercise any veto power over the acts of the Executive branch when it issues such regulations, let alone is there any such authority granted to a single House of Congress. To the contrary, as explained below, this extra-constitutional power claimed by the Congress conflicts with the specific checks written into the Constitution to prevent one branch or one house from usurping the powers of other Government bodies.

The substantiality of the doubt concerning the constitutionality of the one-house veto is confirmed by the dissent

of Judge MacKinnon below (App. II at 97-109) and the fact that most scholars who have addresssd the subject have concluded that it violates one or more constitutional principles (*see* note 16, *infra*). The fundamental thrust of these objections is that the one-house Congressional veto violates what James Madison called the most "sacred" principle of our Constitution (1 Annals of Cong. 604); namely, "that the powers of the three great branches of the National Government be largely separate from one another." *Buckley v. Valeo*, *supra*, 424 U.S. at 120. Thus, under our constitutional system, no one branch may legitimately perform the functions or control the performance of another branch, unless there is an express constitutional exception—a check and balance—creating that interbranch blending of power.[12]

By considering the possible functions performed by a one-house veto of a Commission regulation, it becomes evident that it cannot be exercised consistently with the Constitution. Thus, where Congress vetoes a regulation (or secures changes by the Commission due to the threat of the veto) because the Commission has "misinterpreted" a statutory provision, the veto may be for a legitimate purpose, but the means employed are impermissible, since under the Constitution it is the judiciary, not the legislature, which is responsible for ascertaining Congressional intent and correcting executive misinterpretations. On the other hand, if the Commission's interpretation would be upheld by a court, then a one-house veto is, in effect, a rewriting of the statute by a method other than by action of both Houses of Congress and the President. Finally, if the purpose of the

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[12] *E.g.*, Article I, § 7 (Presidential veto of proposed legislation); Article II, § 2, cl. 2 (Senate's advice and consent on treaties and appointments).

Congressional veto is to implement a Congressional perception that the regulation is unclear or represents an unwise, although permissible, policy choice, then Congress is unduly interfering with the proper exercising of an executive function. Therefore, under any of these assumptions, the Congressional veto runs afoul of separation of powers principles.

Analyzing the issue from the perspective of "control," or interbranch inteference with the performance of another's responsibilities, leads to the same conclusion. Admittedly, the Congress has broad discretion in the manner in which it allocates responsibilities under a given law. However, once it statutorily assigns a power to an executive agency, such as the power to issue rules, that power becomes an executive, not a Congressional, authority. Thereafter, Congress cannot constitutionally interfere with the execution of that executive responsibility except through validly enacted legislation passed by both houses in conjunction with the President. Indeed, it makes no difference that a Congressional veto is never exercised for, as Judge MacKinnon recognized (App. II at 114), equally pervasive and pernicious interference can be exercised simply because the threat of a veto exists.

A further constitutional difficulty with the Congressional veto is that it deprives the President of his veto power under Article I, Section 7. Mr. Justice White has expressed the view that there is no constitutional infirmity regarding the Presidential veto power because regulations become effective through Congressional "nonaction" which is not the "equivalent of legislation." *Buckley v. Valeo, supra,* 424 U.S. at 284-86. However, Judge MacKinnon explained in detail why terming the Congressional veto process as "nonaction" misconceives the reality of the situation (App. II at 98-101), and a thorough review of the constitutional history of the Presidential veto clause demonstrates, we

submit, that the Framers deliberately created a single executive with the power to exercise a qualified veto on his own initiative over every bill, resolution, vote, or similar measure emanating from Congress, *which has the effect of law. See, e.g.,* M. Farrand, *Records of the Federal Convention of 1787,* vol. II, pp. 301-05 (1966); *United States v. California,* 332 U.S. 19, 28 (1947); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive,* 63 Calif. L. Rev. 983, 1066 n.428 (1975).[13] Certainly a one-house veto disapproving a regulation, which would otherwise have the effect of law, revises the law just as much as a statutory change revoking a regulation already having the effect of law. The former, like the latter, changes the law, and the former, like the latter, requires submission to the President. "In the words of Madison, the convention 'gave the Executive alone . . . the revisionary control on the laws, unless overruled by two-thirds of each branch.'" *United States v. Weil,* 29 Ct. Cl. 523, 546 (1894).

In addition, Article I, Section 1, of the Constitution vests all legislative powers "in a Congress" consisting of *both* "a Senate and House of Representatives." This bi-

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[13] The Presidential veto power was included in part to check unwise Congressional decisions, but was intended primarily as a defensive weapon to prevent Legislative encroachment upon Executive powers. *E.g.,* J. Madison, A. Hamilton, and J. Jay, *The Federalist Papers,* No. 73 (1961). It is thus especially ironic that after the Framers refused to give the President an absolute veto to defend himself from the Legislature, the Legislature should now claim the right of an absolute veto to use against the Executive. Equally ironic is the Congressional claim to a "line item" veto power, allowing Congress to modify regulations by vetoing only selected portions, another power denied the President by the Framers. *See* 2 U.S.C. § 438(c)(5); 26 U.S.C. §§ 9009(c)(4) and 9039(c)(4).

cameralism leaves no room for the two Houses to reallocate legislative authority as provided in FECA and Subtitle H, so that the House can control rules for elections to the House and the Senate can control rules for elections to the Senate. 2 U.S.C. § 438(c)(3) and 26 U.S.C. §§ 9009(c) and 9039(c). Indeed, the requirement that every legislative action be taken by both Houses was intended to prevent just the possibility of self-interested action which FECA presents. *See* Federalist No. 51. *See also* Watson, *supra*, 63 Calif. L. Rev. at 1032-43.

Bicameralism made possible the most important compromise in the formation of the Federal Union: the agreement between large and small states for apportioning representation in the House and the Senate. Each House was to serve as a check upon the other, but the one-house veto emasculates this principle by permitting one House to undo a legislative compromise by vetoing regulations adopted by the Executive to implement that compromise. Moreover, if the effective authority to modify the law can be vested in one house, it can as easily be vested in one committee or one chairperson. Indeed, this is the practical effect that the veto has created through the negotiation process which has developed between the respective Congressional committee chairmen and the Commission (Stip. ¶¶63-76; App. I. at 69a-71a). But this power to rewrite the election laws without the approval of both Houses is precisely the power forbidden by Article I, Section 1.

Another constitutional infirmity, which may be unique to the situation presented under the FECA, derives from the fact that those who sit in judgment on whether to veto the Commission's regulations are directly and personally affected by those regulations whenever they run for re-election to federal office. The conflict-of-interest problem raised is

quite different from that presented by the normal legislative process concerning election laws, where each House checks the excesses of the other, and both are checked by the President. It is not necessary to ascribe to Congress any bad faith; it is only necessary to recognize that it is almost impossible for any person to be wholly objective when as important a matter as re-election for the Member, or the election of the candidate of the Member's party for President, may be affected by the outcome of the vote. *See Gibson v. Berryhill*, 411 U.S. 564, 578 (1973). This Court has recognized that actual bias is often impossible to establish in situations such as this, and hence has ruled that due process requires disqualification where there is a "possible temptation" standing in the way of a fair determination. *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972), *quoting Tumey v. Ohio*, 273 U.S. 510, 532 (1927). *Accord, Connally v. Georgia*, 45 U.S.L.W. 3461 (U.S. Jan. 10, 1977) (No. 76-461).

Finally, even if the Members of Congress as legislators can delegate the veto power to the Members of one House as administrators, that delegation is unconstitutional in this instance because it wholly lacks standards and its exercise is not subject to judicial review.[14] Requirements for meaningful standards for exercising delegated powers are especially appropriate in cases like this where exercise of the delegated powers impacts so directly on First Amendment

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[14] In this administrative capacity, Members of Congress are seen as serving as "Officers of the United States," and this conflicts with the Constitution's incompatability clause—"no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. Const. art. I, §6, cl. 2. *See Buckley v. Valeo*, *supra*, 424 U.S. at 124-41.

interests. *See United States v. Robel*, 389 U.S. 258, 277 (1967) (Brennan, J., concurring). Since under the election laws either House has the unfettered discretion to veto a rule because it is unauthorized, unwise, or unworkable, or because it fails to retain an advantage for incumbents, or for any other reason at all, there can be no meaningful judicial review, and thus the one-house veto is also an unconstitutional delegation. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737 (D.D.C. 1971) (three-judge court).

B. The Constitutionality Of The One-House Veto Is A Question Of Such Importance That The Court Should Decide It In The Interests Of All Branches Of Government.

If the sole impact of a ruling on the merits of this case were on the rules of the Federal Election Commission, it might be advisable to obtain the views of the lower courts before this Court passed on the constitutional questions presented. Similarly, if this were an ordinary statute, and not one affecting the very process by which the leaders of our democracy are chosen, there might be a reason not to decide constitutional questions until a full airing in the lower courts had taken place. But those conditions do not obtain here since Congress has specifically mandated in section 437h that constitutional challenges to the election laws should be promptly determined by expedited appeals to this Court and because the inclusion of Congressional veto provisions has increased markedly and is likely to advance at an even faster pace, at least until a definitive ruling is issued on the constitutional question. This question is of concern to both the Executive and Legislative branches, as well as

to the public at large, and it is therefore especially appropriate that this Court resolve the issue at this time.

Although the insertion of Congressional veto provisions is quite common today, it was not until 1932 that the first one was enacted.[15] This device for aggrandizing Congressional power was used only sparsely over the next few decades, but during the late 1960's and 1970's it has emerged as a primary tool of Congressional control over

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[15] Congressional veto provisions were adopted by the Congress for the first time in 1919-20, but the only bill to reach President Wilson was vetoed on constitutional grounds. 59 Cong. Rec. 7026-27, 8069 (1920); 58 Cong. Rec. 8074 (1919). *See* Ginnane, *The Control of Federal Administration By Congressional Resolutions and Committees*, 66 Harv. L. Rev. 569, 575 (1953).

Other Presidents have also vetoed such provisions, *e.g.*, Ford, 122 Cong. Rec. H 7297 (daily ed. July 19, 1976); and every President since Herbert Hoover, supported by opinions of their Attorneys General, have argued that such provisions are unconstitutional. *See* Watson, *supra*, 63 Calif. L. Rev. at 988 n.9.

Upon occasion, Presidents have actually suggested the use of the Congressional veto mechanism in connection with proposals to grant broad new powers to the President. In these cases, however, Congress has often rejected the proposals. *See* J. Harris, *Congressional Control of Administration* 205 (1964). Newspaper accounts suggest that President Carter is at least considering agreeing to the use of the Congressional veto provision in order to secure passage of Executive reorganization authority. N.Y. Times, Nov. 18, 1976, § A, p. 1, col. 8 (city ed.). Some commentators, however, argue that the Congressional veto may be valid in the unique context of the reorganization acts, even though the veto generally cannot be upheld, and most specifically is unconstitutional as used in the election laws at issue here. *E.g.*, R. Dixon, *The Executive on A Leash: The "Congressional Veto" and Separation of Powers*, Address Before the Association of American Law Schools, Dec. 29, 1976.

Executive actions.[16] Thus, while the election laws are unique in allowing a Congressional veto over every rule issued by an entire agency, during the last session alone, Congress adopted the veto as part of ten separate pieces of regulatory legislation. *See* 123 Cong. Rec. H 499 (daily ed. January 24, 1977).

Cumulatively, according to a 1976 Congressional Research Service study, Congress has enacted 295 provisions in 196 different laws which authorize some form of Congressional supervision of Executive actions. Norton, *Congressional Review, Deferral and Disapproval of Executive Action: A Summary and Inventory of Statutory Authority* 1-10 (1976). Even though these figures include many statutes which are not currently in effect, and a large number of statutes having significant differences from those at issue here, it is evident that the Congressional veto assumes great importance in the

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[16] A number of books and articles have described the way the Congressional veto has worked in practice over the past forty-four years, and have also addressed the constitutional problems it raises. The most thorough of these are: J. Harris, *Congressional Control of Administration* 204-48, 282-84 (1964); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Calif. L. Rev. 983 (1975); Ginnane, *The Control of Federal Administration By Congressional Resolutions and Committees*, 66 Harv. L. Rev. 569 (1953). *See also* Note, *Congressional Veto of Administrative Action: The Probable Response To A Constitutional Challenge*, 1976 Duke L. J. 285; Note, *Constitutionality of the Legislative Veto*, 13 Harv. J. Legis. 593 (1976); Cooper and Cooper, *The Legislative Veto and the Constitution*, 30 Geo. Wash. L. Rev. 467 (1962); Schwartz, *Legislative Control of Administrative Rules and Regulations*, 30 N.Y.U.L. Rev. 1031, 1041-45 (1955); Neuman and Keaton, *Congress and the Faithful Execution of Laws - Should Legislators Supervise Administrators?* 41 Calif. L. Rev. 565, 587-88 (1953); Jackson, *A Presidential Legal Opinion*, 66 Harv. L. Rev. 1353 (1953).

workings of government today.[17] This importance is growing significantly greater each year as the rate of passage of statutes containing veto provisions (generally of the one-house variety) is increasing at an increasing rate. In fact, a number of bills now pending before Congress would subject every regulation of every Executive agency to a possible one-house veto, except in narrowly defined emergencies. H.R. 959; H.R. 961; H.R. 1509. *See* 123 Cong. Rec. H 499-500 (daily ed. January 24, 1977). The predecessor of one of these bills was favorably reported by the House Judiciary Committee near the end of the last session and reached the floor under a suspension of the rules, where it failed to gather the necessary two-thirds majority by only two votes. 122 Cong. Rec. H 10666-90, H 10718-19 (daily ed. Sept. 21, 1976) (debate and vote on H.R. 12048); H.R. Rep. No. 94-1014, 94th Cong., 2d Sess. (part I) (1976).

Of course, neither the other Congressional veto statutes nor the other pending bills is before this Court, and this

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[17] The listing of statutes is over-inclusive in several other respects. First, it includes many statutes which were re-enactments of earlier provisions of limited duration. Second, the list includes statutes which merely provide that Congress must be consulted, or that a rule must be allowed to sit before Congress for a fixed period of time. These are not Congressional veto statutes; they only give Congress an opportunity to consider passing another statute before the rule takes effect. Third, the list includes statutes which require affirmative Congressional approval by both Houses of specific actions proposed by the President, a very different situation from one-house disapproval. Fourth, the study also brings within its scope those statutes which require disapproval by both Houses which at least assures that principles of bicameralism are preserved, although still precluding any role in the process for the President. There are also numerous variations in wordings, periods of time involved, and types of actions to which the legislative veto is applicable. Norton, *supra*, at 1-10.

Court need not decide their legality. Nonetheless, this ever-increasing trend toward insertion of Congressional veto provisions underscores the fact that resolution of the merits of this case will have far-reaching implications for the way in which our government seeks to insure agency accountability in the foreseeable future. Just as importantly, failure to decide the issue at this juncture will only postpone the decision until a time when the impact of a declaration of unconstitutionality may have staggering effects, not only upon the relations of government branches, but upon the financial well-being of the Country, as Congressional veto provisions are increasingly being utilized in statutes affecting economic conditions.[18]

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[18] *E.g.*, Emergency Petroleum Allocation Act of 1973, § 4(g)(2), Pub. L. 93-159, 87 Stat. 627; Federal Salary Act of 1967, 2 U.S.C. § 359(1)(B). *See* Kraft, *The Perils of the 'One-House Veto'*, Wash. Post, Jan. 13, 1977, § A, p. 27, col. 1. The Congressional veto provisions in each of these acts have been the subject of legal challenges, but none of the cases is likely to result in a decision on the merits. *Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp.*, Civ. No. 75-483-P (S.D. Ala., Aug. 20, 1976), *appealed*, No. 76-3712 (5th Cir.), an action for breach of contract which also involved a challenge to the Petroleum Act veto provisions, was dismissed as to the veto issue on the ground that that plaintiff lacked standing to raise it. *Id.* slip. op. at 17-18. Likewise, both of the Pay Act cases have been strenuously defended on that ground, as well as non-retroactivity and, most importantly, non-severability grounds. *See Atkins v. United States*, Nos. 41-76, *et al.* (Ct. Cl.); *McCorkle v. United States*, No. 76-1479 (4th Cir.). The case at bar, however, is distinguishable from the Pay Act cases in that here, unlike there, the statute involved contains a severability clause, 2 U.S.C. § 454, and nothing in the legislative history suggests that, but for the Congressional veto, Congress would have withheld the power to fill in the gaps by regulation. *See Buckley v. Valeo*, *supra*, 424 U.S. at 108-09.

Finally, the issue presented is purely a legal one which has been fully briefed by the representatives of Congress, albeit not in these proceedings. There is a full record, which each party considers adequate to the task, to enable the Court to reach a determination of whether the one-house veto of rules of the Commission is consistent with the Constitution. There is nothing more that this Court needs to know in order to rule on this question, and therefore, as in *Buckley*, where the composition of the Commission was passed on without a ruling below, this is the time to decide the merits of this controversy.

CONCLUSION

The Constitution is a complex bundle of compromises and concessions, with each check and balance representing an important part of the whole without which there could have been no concensus. To allow the Congress to circumvent established checks on precipitous actions merely by labeling as non-legislation, acts having the effects of legislation, would soon undo the whole fabric of the Constitution. The dangers of the one-house veto were clearly recognized by Professor Kenneth Culp Davis in a recent letter to Congressman Elliott H. Levitas, a sponsor of several such bills. Professor Davis admonished (123 Cong. Rec. H 961-62 (daily ed. Feb. 8, 1977):

> The idea that a part of Congress, on the basis of political pressures, should set aside professional findings of fact based on a rulemaking record seems to me to be a threat to the American system of government, one of the most serious threats that have come to my attention during my lifetime. It seems to me especially dangerous

because many in Congress may vote for it in order to gain advantage for themselves. Repealing it will be difficult for the same reason, even if the damage it does is devastating.

Although I realize that you probably have the votes, I have not given up hope. Those who agree with me still have a good many lines of defense—enough Congressmen may perceive the need to maintain the proper balance between politicians and professionals, the new President may veto and induce the country to understand the dangers to the American system of government, the courts may quickly and firmly hold the measure unconstitutional (as I fully expect), and even if the measure becomes law a later Congress may realize the damaging effects and quickly repeal it.

In order to resolve these vital questions, the Court should note probable jurisdiction or, in the alternative, issue writs of certiorari as to all questions presented.

Respectfully submitted,

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February 9, 1977

Supreme Court of the United States

October Term, 1976

No. 76-1105

RAMSEY CLARK,
Appellant-Petitioner,

and

UNITED STATES OF AMERICA,
Intervenor,

v.

FRANCIS R. VALEO,
EDMUND L. HENSHAW, JR.,

and

FEDERAL ELECTION COMMISSION,
Appellees-Respondents.

FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPENDIX
Volume I

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Richey, J.

Sept 1 COMPLAINT by pltf.-intervenor, the United States of America. Appearance of Rex E. Lee, Earl J. Silbert, David J. Anderson, and Dennis Linder and Alexis Panagakos.

Aug 30 MOTION to convene a Three-Judge Court heard and taken under advisement; counsel directed to confer and report to the Court; further hearing set 9-1-76 at 10:00 a.m. (Rep: T. Dourian) Richey, J.

Sept 2 AMENDED answer of Francis R. Valeo, Secretary of the Senate; c/s 9-2.

Sept 3 ORDER granting pltfs. motion for certification of certain constitutional questions; certifying "Stipulation as to findings of Fact" as this Court's findings of fact necessary for certification; directing the Clerk of the District Court to deliver forthwith to the Clerk of the Court of Appeals the record in this action. (N) Richey, J.

Sept 3 NOTICE in re application for a three-judge Court to the Chief Judge of the U.S. Court of Appeals. (FIAT)(N) Richey, J.

Sept 3 EXPLANATORY memorandum to the Court of Appeals en banc; Appendix A and B. (FIAT) (N) Richey, J.

Sept 3 STIPULATION as to findings of fact.

Sept 3 ORDER granting leave to the parties to supplement the record in this case with transcripts of portions of relevant meetings of the Federal Election Commission. (N)
Richey, J.

Sept 3 RECORD delivered to USCA pursuant to 2 USC 437h(a) and Order filed 9-3-76; receipt acknowledged. (76-1825)

Sept 7 ORDER directing that a certain line be inserted on page 2 of the Order of Sept. 3,

1976 certifying constitutional questions to the U.S. Court of Appeals; directing the clerk to transmit this Order to the U.S. Court of Appeals. (N) Richey, J.

Sept 2 STATUS CALL. Certain stipulated findings and questions presented to the Court. (Rep: T. Dourian) Richey, J.

Sept 7 ORDER of insertion transmitted to U.S. Court of Appeals; receipt ackn.

Sept 3 DESIGNATION of the Honorable Harold Leventhal and the Honorable Malcolm R. Wilkey, United States Circuit Judges to serve with the Honorable Charles R. Richey United States District Judge, as members of the Court to hear and determine this action. Bazelon, Chief Judge, U.S.C.A.

Sept 3 AMENDED designation of a Judge to serve on Three-Judge District Court by designating the Honorable J. Skelly Wright, United States Circuit Judge to serve in place and stead of the Honorable Malcolm R. Wilkey as a member of the three-judge Court, Wright, J., USCA

Sept 09 MEMORANDUM by defts. #1 and #2 to the Court; attachments (2); c/m 9-9-76.

Sept 9 ORDER filed September 7, 1976 setting hearing 9/10/76, 2:00 P.M.; directing parties to file with the clerk three copies of all briefs with respect to Subtitle H in accordance with the briefing schedule established by the U.S. Court of Appeals; allowing parties leave to file with the Clerk of this Court any additional briefs

addressing jurisdictional or other issues under Subtitle H by 4:00 P.M. on 9/8/76. (N) Richey, J. Leventhal, J., USCA Wright, J. USCA

Sept 8 MOTION by pltf. Clark for summary judgment; c/s 9-8.

Sept 8 BRIEF by pltf. Ramsey Clark.

Sept 8 MEMORANDUM to the Court by intervenor, USA; c/m 9-8.

Sept 8 BRIEF by intervening pltf., United States.

Sept 7 CERTIFIED copy of Order from USCA that this matter is preliminarily deemed to have been properly certified to this court by the District Court pursuant to 437(a) & this court shall proceed to consider the instant matter en banc, in accord with precedent established by this Court in Buckley v. Valeo, 519 F.2d 817 & 519 F.2d 821 (1975), afformed in party [sic] and reversed in part (on other grounds), 424 U.S. 1 (1976). It appearing to the Court that pltf. Clark is a participant in a party primary election for nomination as U.S. Senator from N.Y., which election is to be held on 9/14/76, expedition is required; and ordered that a hearing be held on 9/10/76 at 2:00 P.M. on the certification; and Order by the court that all briefs upon the matters to be argued 9/10/77 shall be filed no later than the close of business, 9/8/76 and further Ordered that on 9/8/76 the Federal Election Commission shall provide to the Clerk of this Court 10 copies of its publication

"Federal Election Campaign Laws (June 1976)", and ten copies of the proposed regulations referred to Congress by the Commmission 8/3/76 and presently lying before Congress.

Sept 14 NOTICE by pltf. Clark of filing two additional copies of certain documents; c/m 9-13.

Sept 28 TRANSCRIPT of proceedings of August 13, 1976, pages 1-55. (Rep: T. Dourian); Court copy.

Sept 28 TRANSCRIPT of proceedings of August 30, 1976, pages 56-111. (Rep: T. Dourian); Court copy.

Oct 13 EXTRACT from Transcript of proceedings of Sept. 10, 1976, pages 1-7; attachment. (Rep: T. Dourian); Court copy.

1977

Jan 26 JUDGMENT filed on 1-21-77 dismissing action and dissolving Three-Judge Court. (N)
Wright, J., USCA
Leventhal, J., USCA
Richey, J., USDC

Feb. 7 NOTICE of Appeal from Order of Jan. 26, 1977.

DOCKET ENTRIES – Court of Appeals

Date	Filings–Proceedings	Filed
9-3-76	Certified Original Record (no transcript) from the United States District Court–(Certified to this Court pursuant to Title 2 USC 437h (a) (n-4)	
9-3-76	4-Plaintiff's motion for expedited briefing schedule (p-3)	
9-3-76	Per Curiam order that this matter is prelimina-	

rily deemed to have been properly certified to this Court by the District Court pursuant to §437 h(a) and this court shall proceed to consider the instant matter en banc, in accord with precedent established by this Court in Buckley v. Valeo, 519 F. 2d 817 and 519 F.2d 821 (1975), affirmed in part and reversed in part (on other grounds) 424 U.S. 1 (1976); a hearing will be held on September 10, 1976 at 2:00 p.m. on the certification; the parties having addressed these questions in their presentations to the District Court such expedition should not be unduly burdensome; all briefs upon the matters to be argued on Friday, September 10, 1976 shall be filed no later than the close of Business Wednesday, September 8, 1976; September 8, 1976, the Federal Election Commission shall provide to the Clerk of this Court ten copies of its publication "Federal Election Campaign Laws (June 1976) and ten copies of the proposed regulations referred to congress by the Commission on August 3, 1976 and presently lying before Congress; CJ Bazelon; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, CJ'

09-3-76	Certified copy of the above order sent to Clerk, U.S. District Court and a copy sent to Judge Richey	
09-7-76	Certified original supplemental record (n-4)	
09-8-76	11-Plaintiff's motion to lodge copies of report (p-8) (Filed by Clark)	
09-8-76	25-Plaintiff's (Ramsey Clark) brief (p-8)	

09-8-76	25-Plaintiff's (United States) brief (p-8)
09-8-76	25-Defendant's (Francis R. Valeo) brief (p-8)
09-8-76	25-Defendant's (Edmund L. Henshaw, Jr.) brief (p-8)
09-8-76	11-Defendant's (Federal Election Commission) motion for leave to file typewritten briefs (p-8)
09-8-76	11-Defendant's (Federal Election Commission) submission in compliance with Court order (p-8)
09-8-76	11-Defendant's (Federal Election Commission) motion to dismiss the action and remand to the District Court as improperly certified (p-8)
09-9-76	Clerk's order granting motion of the Federal Election Commission for leave to file typewritten briefs
09-9-76	11-Brief of Federal Election Commission's (p-8)
09-9-76	Clerk's order, sua sponte, that oral argument in this case presently scheduled on September 10, 1976 to begin at 2 p.m., instead, will commence on the same date at 2:30 p.m.
09-9-76	25-Defendant's (Federal Election Commission) brief (p-9)
09-9-76	11-Plaintiff's (United States) motion for enlargement of time for oral argument (p-9)
09-10-76	Argued before CJ Bazelon; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, CJ en banc; At the outset the court announced that Circuit Judge Robb is a member of this en banc hearing, but is unable to be present. The case will be submitted to him on the briefs and tape recording of oral argument

10-13-76	11-Appellee's (Federal Election Commission) motion for leave to file additional materials (m-12)
10-15-76	Clerk's order granting appellee's (Federal Election Commission) motion for leave to file additional materials
10-15-76	11-Appellee's (Federal Election Comm.) additional materials (m-12)
1-21-77	Opinion Per Curiam.
1-21-77	Concurring opinion in which Chief Judge Bazelon and Circuit Judge Wright Join, filed by Circuit Judge Tamm.
1-21-77	Concurring opinion filed by Circuit Judge Leventhal.
1-21-77	Dissenting opinion filed by Circuit Judge Robinson.
1-21-77	Dissenting opinion filed by Circuit Judge MacKinnon.
1-21-77	Judgment returning the Certified Question to the District Court with instructions to dismiss. (n)
1-21-77	Per Curiam order amending opinion. (majority opinion)
1-24-77	Per Curiam order amending Judge Robinsons dissenting opinion and Judge MacKinnons dissenting opinion.
2-7-77	11-Plaintiffs' Notice of Appeal to the United States Supreme Court from the decision and judgment of Jan. 21st.
2-8-77	Certified copy of plaintiff's notice of appeal to the United States Supreme Court from the decision and judgment of Jan. 21st were mailed to all parties and the Clerk Supreme Court.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

[Dated July 1, 1976] Civil Action No. 76-1227

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

1. This action seeks declaratory and injunctive relief from certain provisions of the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431, *et seq.*, as amended, (hereinafter the "FECA") and Subtitle H of the Internal Revenue Code of 1954, 26 U.S.C. §§ 9001 *et seq.*, as amended, (hereinafter "Subtitle H") and against their administration and enforcement by defendants, on the grounds that these provisions, which allow a single House of Congress to disapprove regulations of the defendant FEDERAL ELECTION COMMISSION ("COMMISSION"), violate the constitutional doctrine of separation of powers and destroy the constitutional system of checks and balances established by Articles I, II and III of the United States Constitution and deprive plaintiff of Due Process of Law under the Fifth Amendment of the United States Constitution.

JURISDICTION

2. This Court has jurisdiction under 2 U.S.C. § 437h, 26 U.S.C. § 9011(b), and 28 U.S.C. § 1331. The amount in controversy, exclusive of interests and costs, exceeds $10,000.

3. Convocation of a three judge district court is required by 26 U.S.C. § 9011 and 28 U.S.C. § 2282, with respect to those issues concerning Subtitle H. Certification to the

United States Court of Appeals for the District of Columbia Circuit is required by 2 U.S.C. § 437h with respect to all other issues.

PARTIES

4(a). Plaintiff RAMSEY CLARK is a candidate for the Democratic Party nomination for United States Senator from the State of New York. He is a citizen of the State of New York and of the United States and is eligible to vote in elections for the office of the President of the United States. He is a registered voter in the State of New York in the Democratic Party.

4(b). In the primary for the Democratic nomination for Senator, plaintiff CLARK is opposed by, among others, Bella Abzug, a sitting Member of the United States House of Representatives. As a Member of the House of Representatives, Ms. Abzug is authorized to, has and will continue to vote on whether to disapprove certain regulations of the FEDERAL ELECTION COMMISSION effecting elections for the United States Senate. In the general election, plaintiff CLARK will be opposed by, among others, James Buckley, a sitting Member of the United States Senate from the State of New York. As a Member of the Senate, Mr. Buckley is authorized to, has and will continue to vote on whether to disapprove regulations of the FEDERAL ELECTION COMMISSION when they effect elections to the United States Senate.

5. Defendant FRANCIS R. VALEO is the duly appointed Secretary of the United States Senate whose duties include furnishing certain services and facilities to and cooperating with the FEDERAL ELECTION COMMISSION in carrying out the COMMISSION's duties. 2 U.S.C. § 438(d)(2). He is also custodian for the COMMISSION of certain reports

and statements submitted pursuant to rules and regulations prescribed by the COMMISSION. 2 U.S.C. § 438(d)(1). Defendant VALEO is an *ex officio* Member of the FEDERAL ELECTION COMMISSION. 2 U.S.C. § 437c(a)(1).

6. Defendant EDMUND L. HENSHAW, Jr., is the duly appointed Clerk of the United States House of Representatives whose duties include furnishing certain services and facilities to and cooperating with the FEDERAL ELECTION COMMISSION in carrying out the COMMISSION's duties. 2 U.S.C. § 438(d)(2). He is also custodian for the COMMISSION of certain reports and statements submitted pursuant to rules and regulations prescribed by the COMMISSION. 2 U.S.C. § 438(d)(1). Defendant HENSAW is an *ex officio* Member of the FEDERAL ELECTION COMMISSION. 2 U.S.C. § 437c(a)(1).

7. Defendant FEDERAL ELECTION COMMISSION was established by § 208(a), Pub. L. 93-443, 88 Stat. 1280, and reconstituted by 2 U.S.C. § 437c. In addition to defendants VALEO and HENSHAW, who are *ex officio* members without a right to vote, the COMMISSION is composed of six voting members appointed by the President of the United States, by and with the advice and consent of the Senate. 2 U.S.C. § 437c.

THE STATUTORY FRAMEWORK

8. The FEDERAL ELECTION COMMISSION has very broad powers, including the powers to: (a) investigate with the aid of compulsory process; (b) exercise exclusive primary jurisdiction with respect to civil enforcement of the FECA and Subtitle II by bringing actions in the federal courts, including actions for declaratory, injunctive, damage or civil fine relief; (c) refer violations to the Attorney General

for possible criminal prosecution; (d) formulate general policy with respect to the FECA and Subtitle H, including all criminal provisions contained in those statutes; and (e) render advisory opinions. 2 U.S.C. §§ 438(a)(10).

9. The COMMISSION is empowered to prescribe rules and regulations to carry out the provisions of the FECA and Subtitle H. 2 U.S.C. §§ 438(a)(10) and 438(d) and 26 U.S.C. §§ 9009 and 9039.

10. Before any such rule or regulation may be put into effect, the COMMISSION must transmit to the Senate or the House of Representatives, as the case may be, a statement setting forth the proposed rule or regulation and a detailed explanation of it. 2 U.S.C. § 438(c)(1) and 26 U.S.C. §§ 9009(c)(1) and 9030(c)(1).

11. Statements concerning a rule or regulation dealing with required reports or statements by a candidate for the office of Senator, and by political committees supporting such a candidate, must be transmitted to the Senate. Statements concerning a rule or regulation dealing with required reports or statements by a candidate for the office of Representative, Delegate, or Resident Commissioner, and by political committees supporting such a candidate, must be transmitted to the House of Representatives. 2 U.S.C. § 438(c)(3).

12. All other statements must be transmitted to both the House of Representatives and the Senate. 2 U.S.C. § 438(c) and 26 U.S.C. §§ 9009(c) and 9039(c).

13. If within 30 legislative days after receipt of such a statement, a body of the Congress disapproves the rule or regulation, or any portion thereof which the body determines to be a single separable rule of law, then the COMMISSION may not put into effect such rule or regu-

lation, or portion thereof which has been disapproved. 2 U.S.C. § 438(c)(2), (c)(4) and 26 U.S.C. §§ 9009(c)(2), (c)(4) and 9039(c)(2), (c)(4).

THE APPLICATION OF THE CONGRESSIONAL VETO

14. On July 30, 1975, the FEDERAL ELECTION COMMISSION referred to both the House of Representatives and the Senate a regulation pertaining to office accounts, usually consisting in part of excess campaign funds, used by Members of Congress to support their activities. A modified version of the regulation, intended to comply with certain suggestions made by Members of Congress, was transmitted to both the House of Representatives and and the Senate on September 30, 1975. On October 8, 1975, the Senate by a single vote rejected a resolution the effect of which would have been to approve the modified version of the regulation. Senator James Buckley, who himself has an office account, voted against the measure. The Senate by voice vote then disapproved both regulations, ordering the Secretary of the Senate, defendant VALEO, to transmit a copy of the disapproval resolution to the defendant COMMISSION. S. Res. 275, 94th Cong., 1st Sess., 121 Cong. Rec. 17888 (daily ed. Oct. 8, 1975).

15. On August 1, 1975, the FEDERAL ELECTION COMMISSION referred to both the House of Representatives and the Senate a regulation providing for the filing of all reports and statements in the first instance with the COMMISSION, instead of allowing members of the House of Representatives and the Senate the special privilege of filing in the first instance with the Clerk of the House and the Secretary of the Senate, respectively, which privilege delays for at least a week reporting and investigations

by the FEDERAL ELECTION COMMISSION. On October 22, 1975, the House of Representatives disapproved the regulation, ordering the Clerk of the House, defendant HENSHAW'S predecessor, to transmit a copy of the disapproval resolution to the defendant COMMISSION. H.R. Res. 780, 94th Cong., 1st Sess., 121 Cong. Rec. 10197 (daily ed. Oct. 22, 1975). Representative Bella Abzug, an opponent of plaintiff CLARK in the New York primary for the Democratic Party nomination for Senator, voted to disapprove the regulation.

16. Several other regulations, including a third version of the office accounts regulation, were referred to the appropriate body of the Congress prior to the Supreme Court's Jan. 30, 1976 decision in *Buckley v. Valeo,* Nos. 75-436 and 75-437. These regulations had not been disapproved, and thirty legislative days had not run, on the date of the aforementioned decision. Subsequently, Congress provided that even rules or regulations adopted by the COMMISSION before the date of enactment of the 1976 amendments to the FECA would not be effective unless they were thereafter subjected to the Congressional veto system. 2 U.S.C. § 437c(g)(3). No such rules or regulations have been resubmitted.

17. Certain proposed rules and regulations are presently being considered by the FEDERAL ELECTION COMMISSION, but they have not yet been approved by the COMMISSION or referred to any body of the Congress.

18. Any rules or regulations approved by the FEDERAL ELECTION COMMISSION will be referred to the appropriate body of Congress and, if disapproved by that body, the rules or regulations will not be put into effect by the COMMISSION.

19. Because of the necessity of avoiding a vote of disapproval by a body of Congress, the COMMISSION has and will continue to modify proposed rules and regulations to correspond with what its members perceive to be the desires and wishes of Members of Congress, sometimes modifying proposed rules and regulations in such a way as to give incumbent candidates for Congress an advantage in elections over non-incumbent candidates for Congress.

CAUSES OF ACTION

20. The FECA and Subtitle H deprive the plaintiff of his constitutional rights by allowing a single House of Congress to disapprove rules and regulations, or selected portions of such rules and regulations, adopted by the FEDERAL ELECTION COMMISSION, and by denying the President of the United States the opportunity to veto such Congressional actions, in violation of the constitutional separation of powers and checks and balances established by Articles I, II and III of the United States Constitution.

21. The FECA and Subtitle H deprive plaintiff of his constitutional rights to have laws affecting him enacted by the full legislative process, including passage by both Houses of Congress with the opportunity for a Presidential veto, and invidiously discriminate against plaintiff by allowing incumbent office-holders, but not challengers, to veto rules and regulations of the COMMISSION, in violation of plaintiff's Right to Due Process of Law under the Fifth Amendment of the United States Constitution.

22. The FECA and Subtitle H deprive plaintiff of his constitutional rights by unconstitutionally delegating the discretion to disapprove regulations of the COMMISSION to a single House of Congress and by delegating such discretion without giving any standards or criteria to govern

the exercise of such discretion and without requiring any statement of reasons for the exercise of such discretion.

23. Unless application of those provisions to the FECA and Subtitle H which allow bodies of Congress to disapprove of rules and regulations adopted by the FEDERAL ELECTION COMMISSION are enjoined by the court, plaintiff will suffer irreparable injury and will suffer unconstitutional impairment of his rights to vote, to participate effectively in the political process and to compete without discrimination in the electoral process.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that the court immediately (a) make application for a three-judge district court to hear the issues raised by this complaint concerning Subtitle H, and (b) certify to the United States Court of Appeals for the District of Columbia Circuit all issues of constitutionality raised by this complaint concerning the FECA, and that such courts:

1. advance on the docket and expedite this action to the greatest extent possible as provided in 2 U.S.C. § 437h and 26 U.S.C. § 9011(b)(2);

2. order, adjudge, decree and declare that the FECA and Subtitle H provisions allowing bodies of Congress to disapprove of regulations adopted by the FEDERAL ELECTION COMMISSION are repugnant to the Constitution of the United States, and that said statutes violate plaintiff's rights under the Constitution of the United States;

3. permanently enjoin and restrain defendants, their agents and assistants from transmitting rules or regulations to any body of Congress pursuant to the foregoing provisions of the FECA and Subtitle H and require defendant

FEDERAL ELECTION COMMISSION to prescribe rules and regulations upon their adoption by it;

4. award plaintiff costs and disbursements in this action; and

5. grant such other and further relief as may be just and proper.

/s/ Larry P. Ellsworth
Larry P. Ellsworth

/s/ Alan B. Morrison
Alan B. Morrison

2000P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 785-3704
Counsel for Plaintiff

Dated: Washington, D.C.
July 1, 1976

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

[Dated Aug. 6, 1976] Civil Action No. 76-1227

COMPLAINT IN INTERVENTION

The United States of America, Plaintiff-Intervenor herein, for its pleading in intervention, alleges as follows:

1. By his complaint, filed July 1, 1976, plaintiff Ramsey Clark has drawn into question the constitutionality of the legislative veto provisions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §438(c) and subtitle H of the Internal Revenue Code of 1954, 26 U.S.C. §§ 9009(c) and 9039(c).

2. Defendants in the action are Francis R. Valeo, Secretary of the United States Senate, Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, and the Federal Election Commission, an agency of the United States.

3. Upon information and belief, none of the existing parties will adequately represent the interest and the position of the Executive Branch that the aforesaid statutory provisions are unconstitutional; therefore, unless intervention is granted the United States will not be able adequately to present, nor will the Court have the benefit of, its participation regarding, and views on, those important issues.

JURISDICTION

4. This Court has jurisdiction under 28 U.S.C. §1345.

5. Relief is requested pursuant to the Declaratory Judgment Act, 28 U.S.C. §§2201, 2202.

PARTIES

6. On information and belief, plaintiff RAMSEY CLARK, a citizen of New York, is a candidate for United States Senator from the State of New York and is eligible to vote in elections for the office of the President of the United States.

7. Defendant FRANCIS R. VALEO is the duly appointed Secretary of the United States Senate, whose duties include furnishing certain services and facilities to and cooperating with the FEDERAL ELECTION COMMISSION in carrying out the COMMISSION'S duties. 2 U.S.C. §438(d)(2). He is also custodian for the COMMISSION of certain reports and statements submitted pursuant to rules and regulations

prescribed by the COMMISSION. 2 U.S.C. §438(d)(1). Defendant VALEO is an *ex officio* Member of the FEDERAL ELECTION COMMISSION. 2 U.S.C. §437c(a)(1).

8. Defendant EDMUND L. HENSHAW, JR., is the duly appointed Clerk of the United States House of Representatives, whose duties include furnishing certain services and facilities to and cooperating with the FEDERAL ELECTION COMMISSION in carrying out the COMMISSION's duties. 2 U.S.C. §438(d)(2). He is also custodian for the COMMISSION of certain reports and statements submitted pursuant to rules and regulations prescribed by the COMMISSION. 2 U.S.C. §438(d)(1). Defendant HENSHAW is an *ex officio* Member of the FEDERAL ELECTION COMMISSION. 2 U.S.C. §437c(a)(1).

9. Defendant FEDERAL ELECTION COMMISSION was established by §208(a), Pub. L. 93-443, 88 Stat. 1280, and reconstituted by 2 U.S.C. §437c Pub. L. 94-283, 90 Stat. 475. In addition to defendants VALEO and HENSHAW, who are *ex officio* members without a right to vote, the COMMISSION is composed of six voting members appointed by the President of the United States, by and with the advice and consent of the Senate. 2 U.S.C. § 437c.

10. The UNITED STATES OF AMERICA intervenes herein to urge this Court to declare that 2 U.S.C. 438(c)(2) and (c)(4), 26 U.S.C. 9009(c)(2) and (c)(4), and 26 U.S.C. 9039(c)(2) and (c)(4), impermissibly intrude upon those areas reserved by the Constitution of the United States to the Executive Branch of the United States.

THE STATUTORY SCHEME

11. The Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §431 *et seq.* and Subtitle H of the Internal Revenue Code of 1954, 26 U.S.C. §§9001 *et seq.*, as amended, provide, *inter alia*, for public disclosure of receipts and expenses of candidates and political committees involved in federal primary and general elections, funding of primary and general campaigns of presidential candidates and nominees, and the setting of overall campaign expenditure limits.

12. The COMMISSION is empowered to prescribe rules and regulations to carry out the provisions of the FECA and Subtitle H. 2 U.S.C. §§438(a)(10) and 438(d) and 26 U.S.C. §§9009 and 9039.

13. Before any such rule or regulation may be put into effect, the statute purports to require the COMMISSION to transmit to the Senate, the House of Representatives or both, as the case may be, a statement setting forth the proposed rule or regulation and a detailed explanation of it. 2 U.S.C. §438(c)(1) and 26 U.S.C. §§9009(c)(1) and 9039(c)(1).

14. Statements concerning a rule or regulation dealing with required reports or statements by a candidate for the office of Senator, and by political committees supporting such a candidate, must be transmitted to the Senate. Statements concerning a rule or regulation dealing with required reports or statements by a candidate for the office of Representative, Delegate, or Resident Commissioner, and by political committees supporting such a candidate, must be transmitted to the House of Representatives. 2 U.S.C. §438(c)(3).

15. All other statements must be transmitted to both the House of Representatives and the Senate. 2 U.S.C. §438(c) and 26 U.S.C. §§9009(c) and 9039(c).

16. If within 30 legislative days after receipt of such a statement, a House of Congress disapproves the rule or regulation, or any portion thereof which that body determines to be a single separable rule of law, then the COMMISSION may not put into effect such rule or regulation, or portion thereof which has been disapproved. 2 U.S.C. §438(c)(2), (c)(4) and 26 U.S.C. §§9009(c)(2), (c)(4) and 9039(c)(2), (c)(4).

CONSTITUTIONAL INFIRMITIES

17. The one-house veto provisions of the Federal Election Campaign Act of 1971, as amended, identified in paragraphs 13-16 above, violate the constitutional principle of separation of powers as embodied in Articles I, II and III of the United States Constitution.

18. The one-house veto provisions illegally and unconstitutionally permit the evasion of the Presidential veto requirements of Article I, §7, clauses 1, 2 and 3 of the United States Constitution.

19. The one-house veto provisions constitute an unlawful and unconstitutional delegation of legislative power to one House of Congress.

20. The one-house veto provisions are in derogation of Article I of the Constitution in purporting to endow a House of Congress with powers outside of those specifically enumerated in the Constitution.

21. If permitted to operate, the challenged provisions will deprive the President of the United States of powers

committed to his office and the Executive Branch of government by the Constitution and will allow each House of Congress to separately perform legislative acts in derogation of Articles I and II of the Constitution.

22. The United States has no adequate remedy at law.

WHEREFORE, plaintiff-intervenor, the United States of America, prays that the Court declare, adjudge and decree that the one-house veto provisions of the Federal Election Campaign Act of 1971, as amended – 2 U.S.C. §438(c) and 26 U.S.C. §§9009(c) and 9039(c) – be and are unconstitutional.

REX E. LEE
Assistant Attorney General

EARL J. SILBERT
United States Attorney

DAVID J. ANDERSON

DENNIS LINDER

ALEXIS PANAGAKOS

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Attorneys for Intervenor,
United States of America

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

[Dated Aug. 23, 1976] Civil Action No. 76-1227

ANSWER OF DEFENDANT VALEO

Defendant Francis R. Valeo, Secretary of the United States Senate, for answer to the numbered paragraphs of the complaint states as follows:

1. In answer to paragraph 1, defendant Valeo states that the allegations in this paragraph describe the claims of the plaintiff, which claims are denied. Defendant Valeo avers that the relief sought by the plaintiff would frustrate the federal election campaign reforms which would otherwise be achieved through the administration and enforcement of the Federal Election Campaign Act of 1971, as amended, (hereinafter the "FECA"), especially during the primary and general elections of 1976 in which plaintiff is a candidate.

2. The allegations of paragraph 2 are denied. Defendant Valeo avers that, in the absence of a "case or controversy" required by Article III of the Constitution, no jurisdiction can accrue to this Court under 2 U.S.C. § 437(h), 26 U.S.C. § 9011(b), and 28 U.S.C. § 1331.

3. The allegations of paragraph 3 are denied. Defendant Valeo avers that in the absence of a "case or controversy" required by Article III of the Constitution the convocation of a three judge district court is not required with respect to any issues concerning public financing of campaigns for the Presidency, Subtitle H of the Internal Revenue Code of 1954, 26 U.S.C. §§ 9001 *et seq.*, as

amended, (hereinafter "Subtitle H"), or 28 U.S.C. § 2282 (now repealed), and that certification to the United States Court of Appeals for the District of Columbia is not required with respect to any other matter in the absence of a "case or controversy" required by Article III of the Constitution.

4. (a) Defendant Valeo admits that plaintiff asserts he is a candidate for the nomination of the Democratic Party for United States Senator from the State of New York, and that plaintiff asserts that he is a registered voter in the State of New York in the Democratic Party. Defendant Valeo has no knowledge or information sufficient to form a belief as to whether plaintiff is, in fact, a citizen of the State of New York and eligible to vote in elections for the office of the President of the United States.

(b) For answer to the allegations in paragraph 4(b), defendant Valeo admits only that plaintiff seeks the nomination of the Democratic Party for the office of United States Senator from New York, that Bella Abzug is one of 435 members of the House of Representatives, and that James Buckley is one of 100 members of the United States Senate. Defendant Valeo denies the remaining allegations and avers that unless a resolution of disapproval of any regulations of the Federal Election Commission (hereinafter the "Commission") is reported to and made the pending business of the Senate, no member of the Senate can vote either for or against the disapproval of such regulations, and that Senator Buckley does not serve as a member of the Committee to which such regulations are referred for report and recommendation to the Senate. Defendant Valeo is informed and believes that Representative Abzug is, similarly, not a member of the Committee of the House of Represen-

tatives to which proposed regulations transmitted by the Commission to the House of Representatives are referred. Defendant Valeo further avers that proposed regulations of the Commission pertaining to elections to the House of Representatives are transmitted to the House, regulations pertaining to elections to the Senate are transmitted to the Senate, and regulations affecting the election of the President are transmitted to both Houses of Congress, and that, therefore, Representative Abzug has not and will not have the opportunity to vote on proposed regulations of the Commission pertaining to elections to the Senate except to the extent they also pertain to elections to the House of Representatives or for President. Defendant Valeo further avers that, except with respect to regulations affecting Presidential campaign funding, most regulations proposed by the Commission relating to the disclosure of campaign contributions and expenditures apply to the primary and general elections for all federal offices, rather than to elections to the Senate or to the House of Representatives, and, therefore, treat all candidates for federal office alike.

5. Defendant Valeo admits that he is the duly selected Secretary of the United States Senate, that he is an ex officio, nonvoting member of the Commission, and that he has the official responsibilities provided by 2 U.S.C. § 438(d)(1) and (d)(2). Defendant Valeo avers that, as a nonvoting member of the Commission and as an officer but not a member of the United States Senate, he is not authorized to participate in the decision of the Commission to transmit proposed regulations to the United States Senate or in the recommendation or action by the Senate or any of its Committees with respect thereto.

6. Defendant Valeo admits that defendant Henshaw is the duly elected Clerk of the United States House of Representatives, that he is an ex officio, nonvoting member of the Commission, and that he has the official responsibilities provided by 2 U.S.C. § 438(d)(1) and (d)(2). Defendant Valeo avers upon information and belief that, as a nonvoting member of the Commission and as an officer but not a member of the United States House of Representatives, defendant Henshaw is not authorized to participate in the decision of the Commission to transmit proposed regulations to the United States House of Representatives or in the recommendation or action by the House or any of its Committees with respect thereto.

7. The allegations of paragraph 7 are admitted.

8. The allegations of paragraph 8 constitute plaintiff's restatement of the provisions of the statute. To the extent they are accurate, they are admitted, except that clause (d) is, on its face, inaccurate and is denied.

9. The allegations in paragraph 9 are denied in that they misstate the provisions of the statute referred to therein. Section 9009 of Title 26 U.S.C. provides that the Commission is authorized to prescribe rules and regulations only to carry out the functions and duties imposed on it by said chapter. Section 9039 of Title 26 provides that the Commission is authorized to issue rules and regulations only to carry out its responsibilities under that chapter. Neither section provides that the Commission is authorized to prescribe rules and regulations to carry out the provisions of subtitle H, except as they apply to such functions and duties or responsibilities. Defendant Valeo further avers that the authority of the Commission to prescribe rules and regulations under section 438 (a)(10) and 438(d) of Title 2 U.S. Code is expressly limited to rules and regulations which are prescribed in accordance

with the provisions of Section 438(c) of Title 2 United States Code, and that the Commission has no authority to prescribe rules and regulations except in compliance with subsection 438(c).

10. The allegations in paragraph 10 are admitted, and defendant Valeo avers that the requirement that a proposed rule or regulation and a detailed explanation of it be transmitted to Congress is a means of providing notice and opportunity for comment on such proposed rule or regulation by the Senate or the House of Representatives, or both, as the case may be.

11. The allegations in paragraph 11 are admitted.

12. The allegations in paragraph 12 are admitted, and defendant Valeo avers that under the scheme of FECA said statements and proposed rules include rules and regulations applicable to primary and general elections for President and are required, therefore, under the system of checks and balances provided in the Constitution which apply even between the two Houses of Congress, to be transmitted to both Houses of Congress. Defendant Valeo further avers on information and belief that any of said statements which affect primary and general elections for President are also transmitted to the Office of the President for comment and that comments from political parties and other interested members of the public are solicited with respect to all proposed rules and regulations.

13. The allegations of paragraph 13 purport to state the provisions of various sections of an Act of Congress. Defendant Valeo denies that said allegations accurately state the provisions of the statutes referred to in said paragraph.

14. For answer to the allegations in paragraph 14, defendant Valeo denies that said allegations accurately state the

events referred to therein, and denies, on information and belief, that office accounts usually consist in part of excess campaign funds. Defendant Valeo further avers that the consideration by the Senate of the two regulations proposed by the Commission referred to in said paragraph is set out in Senate Report 94-409 and in the proceedings of the Senate for October 8, 1975; that said Report states:

> "However, the Committee is of the opinion that the regulation would be acceptable if it were drafted in such form as to treat every Federal officeholder, non-Federal officeholder, and other potential candidates equally.
>
> * * *
>
> Also, it should apply to every individual who becomes a candidate for nomination or election to Federal office." (Report, pp. 3-4);

that Senators having no office account and Senators whose office accounts consisted solely of their personal funds also voted to reject the amendment which would have had the effect of approving the modified version of the regulation; and that 50 percent more Senators who would be candidates for reelection this year voted in favor of said amendment (18) than voted against said amendment (13). A copy of said Senate proceedings for October 8, 1975, is attached hereto as Exhibit A. [Not reproduced]

15. For answer to paragraph 15, defendant Valeo denies the allegations in the first sentence and further denies any implication that the regulation referred to was designed by the Commission to favor non-incumbent candidates for office, as opposed to incumbents. Defendant Valeo avers that, as set out in the letter of the Clerk of the House placed in the record of the proceedings of the House for

October 22, 1975, a copy of which is attached hereto as Exhibit B, under the procedures used by the Secretary and the Clerk the copies of statements and reports filed with them are made available simultaneously with no delay for their use and the use of the Commission. Defendant Valeo admits the allegations in the second and third sentences and further avers that while all members of the House of Representatives from New York would be up for reelection this year if they choose to run, 13 members of the House of Representatives from the State of New York voted against the resolution to disapprove the proposed regulation of the Commission and 23 members of the House of Representatives, including Representatives Abzug, Addabbo, Ambro, Badillo, Biaggi, Bingham, Chisholm, Delaney, Hanley, Holtzman, Horton, Kemp, Koch, LaFalce, Ottinger, Pattison, Pike, Rangel, Rosenthal, Scheuer, Stratton, Wolff and Zeferetti, voted in favor of the resolution of disapproval, and that no inference can be drawn from such vote that it deprived plaintiff of due process of law under the Fifth Amendment to the United States Constitution. Defendant Valeo further avers on information and belief that Representative Abzug joined a bipartisan group of more than 60 members of the House of Representatives in an amendment to make changes in the composition of the Commission and to eliminate congressional committee veto of the Commission's regulations so that its independence would be assured, that a variation of this amendment was accepted by the committee and presented to the House as a committee amendment and was adopted by a vote of 391 to 25 with Representative Abzug voting in favor of the amendment.

16. For answer to paragraph 16, defendant Valeo admits the allegations in the first two sentences and denies the allegations in the second two sentences of that paragraph.

17. The allegations in paragraph 17 are denied.

18. The allegations of paragraph 18 are denied because any rules and regulations proposed by the Commission may be prescribed by the Commission unless disapproved by the appropriate House of Congress within 30 legislative days after receipt of such proposed regulation by such body.

19. The allegations of paragraph 19 are denied, and defendant Valeo avers that the Commission by public notice in the Federal Register and by submission of proposed rules to the Congress, actively solicits comments on such proposed rules from all interested persons for the purpose of assuring that any rules finally prescribed are fair and equitable.

20. The allegations in paragraph 20 are denied and defendant Valeo avers that under the Constitution a single House of Congress can disapprove any proposal submitted by the Commission to Congress, or to either House thereof, including a proposal under 438(c), and, thereby, deny to the President the opportunity to veto such Congressional action, and he further avers that, in any event, no Congressional action is required after the Commission submits its proposed rules to Congress to permit the Commission to prescribe such proposed rules, and that in such event there also would be no Congressional action for the President to be denied the opportunity to veto.

21. The allegations in paragraph 21 are denied, and defendant Valeo avers that the rules and regulations of the Commission are not "laws," and he further avers that the FECA does not discriminate against plaintiff, but, instead, applies equally to incumbents and challengers.

22. The allegations of paragraph 22 are denied, and defendant Valeo avers that under the Constitution either House

of Congress may disapprove or refuse to adopt any proposal submitted to it and that the Congress of the United States in which all legislative powers granted by the Constitution are vested cannot constitutionally impose on either House standards or criteria governing the exercise by such House of its functions.

23. The allegations of paragraph 23 are denied and defendant Valeo avers that the provisions of FECA and Subtitle H referred to therein in fact provide plaintiff an opportunity to challenge and have set aside proposed regulations of the Commission which might otherwise cause him irreparable injury and unconstitutional impairment of his rights in that plaintiff and other voters can elect members of Congress who they anticipate will act in accordance with their views and defeat candidates or refuse to reelect members of Congress who they anticipate will not act in accordance with their views.

AFFIRMATIVE DEFENSES

1. The plaintiff has failed to state a claim upon which relief can be granted, particularly in that the requested injunction requiring the defendant Commission's rules and regulations to become effective upon adoption by the Commission has no relationship to the stated claim that the plaintiff is entitled "to have laws affecting him enacted by the full legislative process."

2. The grant of the declaratory and injunctive relief requested would require the Judicial Branch, in violation of Article III of the Constitution and the constitutional doctrine of separation of powers, to rewrite substantive and procedural provisions of a statute which has been enacted by the Congress and signed by the President.

3. The plaintiff lacks standing to bring this action, having alleged no injury in fact with respect to the Congressional veto of any Commission rule or regulation applicable to him as a voter or candidate for office and having otherwise alleged no "case or controversy" within the meaning of Article III of the Constitution of the United States.

4. The plaintiff lacks standing to assert or litigate the question whether the President of the United States has been denied the opportunity to veto any Congressional action disapproving rules and regulations adopted by the Federal Election Commission.

5. In the absence of a "case or controversy" and in the absence of any alleged injury in fact stemming from a Congressional veto of a specific rule or regulation of the Commission that would affect the plaintiff as a voter or candidate for office, the Court lacks jurisdiction over the subject matter of this action, and it lacks jurisdiction to certify any constitutional questions to the Court of Appeals or to request the convening of a three judge district court.

PRAYER

WHEREFORE, the defendant Valeo prays that this Court deny all relief that the plaintiff has requested, including the requests that certain constitutional questions be certified to the United States Court of Appeals for the District of Columbia Circuit and that application be made for the convening of a three judge district court to hear other issues.

The defendant Henshaw [sic] further prays that this Court dismiss the complaint with prejudice, and award the defendant Valeo the taxable costs and attorneys fees resulting from the bringing of this action by the plaintiff.

Respectfully submitted,

/s/ Cornelius B. Kennedy
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(202) 298-8208

Attorneys for Francis R. Valeo,
Secretary of the Senate

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

[Dated August 23, 1976] Civil Action No. 76-1227

ANSWER OF DEFENDANT
EDMUND L. HENSHAW, Jr.

The defendant Edmund L. Henshaw, Jr., Clerk of the United States House of Reprsentatives, answers the numbered paragraphs of the complaint as follows:

1. Defendant Henshaw denies all allegations in paragraph 1 that purport to describe the plaintiff's claims, constitutional or otherwise. Defendant Henshaw avers that the plaintiff has no standing to assert any claimed violation of the constitutional doctrine of separation of powers or any claimed destruction of the constitutional system of checks and balances established by Articles I, II and III of the United States Constitution. Defendant Henshaw further avers that the plaintiff has alleged no injury in fact, with reference to a Congressional veto of a specific regulation affecting the plaintiff as a voter or candidate for office, that entitles him to assert

any deprivation of Due Process of Law under the Fifth Amendment of the United States Constitution.

2. Defendant Henshaw denies all the jurisdictional allegations of paragraph 2, including the allegation that the amount in controversy, exclusive of interests and costs, exceeds $10,000. Defendant Henshaw avers that, in the absence of a "case or controversy" within the meaning of Article III of the United States Constitution, no jurisdiction can accrue to this Court under 2 U.S.C. §437h, 26 U.S.C. §9011(b), or 28 U.S.C. §1331.

3. Defendant Henshaw denies all the jurisdictional and procedural allegations of paragraph 3. Defendant Henshaw avers that, in the absence of a "case or controversy" within the meaning of Article III of the United States Constitution, the convening of a three judge district court is not required by 26 U.S.C. §9011 or 28 U.S.C. §2282 (now repealed) with respect to the Subtitle H issues, and that certification of all other issues to the United States Court of Appeals for the District of Columbia Circuit is not required and cannot be had. Defendant Henshaw specifically avers that 28 U.S.C. §2282 was repealed when, on August 12, 1976, the President signed into law S.537 (94th Cong., 1st Sess.).

4(a). Defendant Henshaw, on information and belief, admits that the plaintiff is a candidate for the Democratic nomination for United States Senator from the State of New York. Defendant Henshaw has no knowledge or information sufficient to form a belief as to whether the plaintiff is in fact a citizen of the State of New York and of the United States, or is eligible to vote in elections for the office of the President of the United States, or is a registered voter in the State of New York in the Democratic Party.

4(b). Defendant Henshaw, on information and belief, admits that, in the primary for the Democratic nomination for United States Senator from the State of New York, the plaintiff is opposed by, among others, Bella Abzug, a sitting Member of the United States House of Representatives. Defendant Henshaw further admits, on information and belief, that James Buckley is a sitting member of the United States Senate from the State of New York, but asserts that it is entirely premature at this point to admit or deny that either the plaintiff or the said James Buckley will be involved, or opposed to each other, in the general election in November of 1976. Defendant Henshaw further avers that Rep. Bella Abzug is not a member of any Committee of the House of Representatives to which proposed regulations of the defendant Commission, to the extent that they are referrable to the House, are or will be referred, and that unless a resolution of disapproval of any such regulations is reported to and made the pending business of the House of Representatives, Rep. Bella Abzug is not authorized to and cannot vote on whether to disapprove such regulations. Defendant Henshaw further avers, on information and belief, that Senator Buckley does not serve on any Committee of the Senate to which proposed regulations of the defendant Commission, to the extent that they are referrable to the Senate, are or will be referred, and that unless a resolution of disapproval of any such regulations is reported to and made the pending business of the Senate, Senator Buckley is not authorized to and cannot vote on whether to disapprove such regulations.

5. Defendant Henshaw admits that the defendant Valeo is the duly elected Secretary of the United States Senate, that he is an ex officio, non-voting member of the defendant Commission,and that he has the official responsibility set forth in 2 U.S.C. §438(d)(1) and (d)(2).

6. Defendant Henshaw admits that he is the duly elected Clerk of the United States House of Representatives, that he is an ex officio, non-voting member of the defendant Commission, and that he has the official responsibilities set forth in 2 U.S.C. §438(d)(1) and (d)(2).

7. Defendant Henshaw admits the allegations of paragraph 7 of the complaint.

8. Defendant Henshaw denies that any of the powers of the defendant Commission are set forth in 2 U.S.C. §438 (a)(10), and avers that the sections of the Federal Election Campaign Act that do set forth the powers of the defendant Commission speak for themselves. See, e.g., 2 U.S.C. §437d.

9. Defendant Henshaw avers that the provisions of 2 U.S.C. §§438(a)(10) and 438(d), and 26 U.S.C. §§9009 and 9039 speak for themselves.

10. Defendant Henshaw avers that the provisions of 2 U.S.C. §438(c)(2) and 26 U.S.C. §§9009(c)(1) and 9030(c)(1) speak for themselves.

11. Defendant Henshaw avers that the provisions of 2 U.S.C. §438(c)(3) speak for themselves.

12. Defendant Henshaw avers that the provisions of 2 U.S.C. §438(c) and 26 U.S.C. §§9009(c) and 9039(c) speak for themselves.

13. Defendant Henshaw avers that the provisions of 2 U.S.C. §438(c)(2), (c)(4), and 26 U.S.C. §§9009(c)(2), (c)(4) and 9039(c)(2), (c)(4), speak for themselves. Defendant Henshaw denies the allegation in paragraph 13 of the complaint that these statutory sections provide that the defendant Commission "may not put into effect" any rule or regulation or portion thereof that has been disapproved by a body of the Congress.

14. Defendant Henshaw denies the allegations in paragraph 14 of the complaint insofar as they purport to be an accurate account of the events referred to therein. He specifically denies the allegation describing office accounts as "usually consisting in part of excess campaign funds." He further denies the allegation that a modified version of the referenced regulation, as transmitted to the Congress on September 30, 1975, was "intended to comply with certain suggestions made by Members of Congress." Defendant Henshaw avers, on information and belief, that the reasons for the Senate's disapproval of the two regulations in question are accurately set forth in Senate Report 94-409 and in the proceedings of the Senate for October 8, 1975.

15. Defendant Henshaw, while admitting the allegation in paragraph 15 of the complaint that the House of Representatives disapproved the referenced regulation on October 22, 1975,

(1) Denies the allegation that the members of the House of Representatives and the Senate have a "special privilege of filing [reports and statements] in the first instance with the Clerk of the House and the Secretary of the Senate, respectively, which privilege delays for at least a week reporting and investigations by the FEDERAL ELECTION COMMISSION." Defendant Henshaw avers that all such reports and statements by both incumbent and non-incumbent candidates, which are filed in the first instance with the Clerk of the House and the Secretary of the Senate, are immediately copied on microfilm and the microfilm copies are transmitted simultaneously to the defendant Commission and to the respective body of the Congress.

(2) Denies the allegation that Rep. Bella Abzug, "an opponent of plaintiff CLARK in the New York primary for

the Democratic Party nomination for Senator, voted to disapprove the regulation," to the extent that the allegation implies that her vote to disapprove in any way constituted a violation of plaintiff's right to Due Process of Law under the Fifth Amendment of the United States Constitution. Defendant Henshaw further denies any implication in paragraph 15 of the complaint that the regulation in question was designed by the Commission to favor non-incumbent candidates for office, as opposed to incumbent members of the House of Representatives and the Senate, or that the disapproval of the regulation by the House of Representatives in any way violated plaintiff's right to Due Process of Law under the Fifth Amendment of the United States Constitution.

16. Defendant Henshaw admits the allegations contained in the first two sentences of paragraph 16 of the complaint. As to the third sentence, defendant Henshaw avers that the provisions of 2 U.S.C. §437(g)(3) speak for themselves and that the plaintiff's summary thereof is inaccurate and incomplete. Defendant Henshaw denies the allegation in the fourth sentence, inasmuch as the defendant Commission did in fact submit rules and regulations to the Congress on or about August 3, 1976.

17. Defendant Henshaw denies the allegations in paragraph 17 of the complaint, inasmuch as proposed rules and regulations have been approved by the defendant Commission and submitted to the appropriate bodies of the Congress on or about August 3, 1976.

18. Defendant Henshaw avers that the allegations of paragraph 18 of the complaint are an incomplete and inaccurate summarization of the procedures therein referred to. The procedures are set forth in 2 U.S.C. §438(c) and 26 U.S.C.

§§9009(c) and 9039(c), the provisions of which speak for themselves.

19. Defendant Henshaw denies the allegations of paragraph 19 of the complaint. Defendant Henshaw avers that, while the defendant Commission does consult with members of the Congress and their staffs (as well as all other interested persons) as to the substance of proposed regulations, such consultation is not designed to cause the Commission to modify proposed rules to correspond "with what its members perceive to be the desires and wishes of Members of Congress." Defendant Henshaw further avers that at no time has the Commission, as the result of such consultations, modified proposed rules "in such a way as to give incumbent candidates for Congress an advantage in elections over non-incumbent candidates for Congress."

20. Defendant Henshaw denies each and every allegation in paragraph 20 of the complaint. In particular, he avers that any Congressional action with respect to disapproving the defendant Commission's proposed rules is not an Order, Resolution or Vote to which the Concurrence of the Senate and House of Representatives may be necessary," within the meaning of Article I, Section 7, Clause 3, of the Constitution, so as to be subject to veto by the President of the United States.

21. Defendant Henshaw denies each and every allegation in paragraph 21 of the complaint. In particular, he avers that Congressional actions with respect to disapproving the Commission's proposed rules are not "laws . . . enacted by the full legislative process," and hence are not subject to Presidential veto pursuant to the Presentation Clause of the Constitution, Article I, Section 7, Clause 3. Defendant Henshaw further avers that the Federal Election Campaign Act,

on its face and as applied to the plaintiff, does not in any way "discriminate against plaintiff by allowing incumbent officeholders, but not challengers, to veto rules and regulations of the COMMISSION."

22. Defendant Henshaw denies each and every allegation of paragraph 22 of the complaint. In particular, he avers that Article I of the Constitution does not require that the Congress, by statute, impose on either House of Congress standards or criteria for exercising the discretionary aspects of its various legislative functions and actions.

23. Defendant Henshaw denies each and every allegation of paragraph 23 of the complaint. In particular, he avers that the actions of the defendants complained of in the complaint have no conceivable effect, and none has been alleged, on the plaintiff's right "to vote, to participate effectively in the political process and to compete without discrimination in the electoral process." He further avers that the allegation in paragraph 23 of the complaint that the plaintiff "will suffer irreparable injury" unless the prayed relief is granted is insufficient, without identifying some specific Commission rule or regulation affecting the plaintiff that has been vetoed by the Congress, to constitute or support a cause of action.

AFFIRMATIVE DEFENSES

1. The plaintiff has failed to state a claim upon which relief can be granted, particularly in that the requested injunctions requiring the defendant Commission's rules and regulations to become effective upon adoption by the Commission has no relationship to the stated claim that the plaintiff is entitled "to have laws affecting him enacted by the full legislative process."

2. The grant of the requested declaratory and injunctive relief would require the judiciary, in violation of Article III of the Constitution of the United States and the constitutional doctrine of separation of powers, to rewrite substantive and procedural provisions of a statute that has been enacted by Congress and signed by the President of the United States.

3. The plaintiff lacks standing to bring this action, having alleged no injury in fact with respect to the Congresssional veto of any Commission rule or regulation applicable to him as a voter or candidate for office, and having otherwise alleged no "case or controversy" within the meaning of Article III of the Constitution of the United States.

4. The plaintiff lacks standing to assert or litigate the question whether the President of the United States has been denied the opportunity to veto any Congressional action disapproving rules and regulations adopted by the Federal Election Commission.

5. In the absence of a "case or controversy" and in the absence of any alleged injury in fact stemming from a Congresssional veto of a specific rule or regulation of the Commission that would affect the plaintiff as a voter or candidate for office, the Court lacks jurisdiction over the subject matter of this action, and it lacks jurisdiction to certify any constitutional questions to the Court of Appeals or to request the convening of a three-judge district court.

PRAYER

WHEREFORE, the defendant Henshaw prays that this Court deny all relief that the plaintiff has requested, including the requests that certain constitutional questions be certified to the United States Court of Appeals for the District

of Columbia Circuit and that application be made for the convening of a three-judge district court to hear other issues.

The defendant Henshaw further prays that this Court dismiss the complaint with prejudice, and award the defendant Henshaw the taxable costs and attorneys fees resulting from the bringing of this action by the plaintiff.

Respectfully submitted,

/s/ Eugene Gressman
Eugene Gressman
1828 L Street, N.W.
Washington, D.C. 20036
466-8400

Counsel for Edmund L. Henshaw, Jr.,
Clerk of the United States
House of Representatives

Dated:
August 23, 1976

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

[Dated August 24, 1976] Civil Action No. 76-1227

ANSWER

1. Defendant, Federal Election Commission (hereafter "the Commisssion") denies that the contested provisions of the Federal Election Campaign Act of 1971, as amended (2 U.S.C. §431, *et seq.*) (hereafter "the Act") and Subtitle H of the Internal Revenue Code of 1954, as amended (26 U.S.C. §9001, *et seq.*) (hereafter Subtitle H) deprive plaintiff of any

right or privilege protected by the Constitution of the United States or the amendments thereto.

2. The Commission denies that this Court has jurisdiction over the action and denies that there is any amount in controversy between the parties.

3. The Commission denies that 26 U.S.C. §9011 requires the convocation of a three-judge court for issues with regard to Subtitle H of the Internal Revenue Code. The Commission also denies that 28 U.S.C. §2282 requires the convening of a three-judge court both because such a court is not required under the terms of the statute and because it has been repealed since the filing of the complaint. The Commission also denies that 2 U.S.C. §437h requires certification of all other issues to the United States Court of Appeals for the District of Columbia.

4. On information and belief, the Commission admits the allegations of paragraph 4a and b, except to state that it is uncertain whether plaintiff Clark will participate in the general election and who his opponents will be in the event that he does.

5. The Commission admits the allegation of paragraph 5.

6. The Commission admits the allegation of paragraph 6.

7. The Commission admits the allegation of paragraph 7.

8. The Commission admits that it has power with regard to the matters enumerated in paragraph 8, as well as other powers, but submits that those powers are set forth not in 2 U.S.C. §438(a)(10) but in the body of the relevant statutes, 2 U.S.C. §431, *et seq.* and 26 U.S.C. §9001, *et seq.*

9. The Commission admits the allegations of paragraph 9.

10. The Commission admits the allegation of paragraph 10.

11. The Commission admits the allegations of paragraph 11.

12. The Commission admits the allegation of paragraph 12.

13. The Commission admits the allegation of paragraph 13, except to state that the words of the statute are not that it may not put into effect rules or regulations disapproved under the statute but that it "may not prescribe" any disapproved rule or regulation. 2 U.S.C. §438(c)(2), 26 U.S.C. §§9009(c)(2) and 9039(c)(2).

14. The Commission admits the allegation of paragraph 14, except to state that (a) while the regulation was modified in light of the comments received those changes were not done "to comply with certain suggestions made by Members of Congress" and (b) while excess campaign funds have in the past been deposited by Members of Congresss in their office accounts, the Commission has insufficient knowledge to conclude that this is "usually" the practice.

15. The Commission admits the allegations of paragraph 15 as to the submission and disapproval of regulations relating to the point of entry for reports and statements, but denies (1) that there is any special privilege for filing in the first instance with the Clerk of the House of Representatives or the Secretary of the Senate, except that the Federal Election Campaign Act provides that all reports and statements relating to all candidates for the Senate, incumbents and non-incumbents shall be filed with the Secretary of the Senate and all reports and statements relating to all candidates for the House, incumbents and non-incumbents shall be filed with the Clerk of the House, and (2) that

the filing in the first instance with the Clerk of the House and the Secretary of the Senate results in a delay of a week in reporting any investigations, since the reports are immediately sent out to be copied onto microfilm, and copies of the microfilm are transmitted simultaneously to the Commission and the respective body of Congress.

16. The Commission admits the allegations of paragraph 16, but states that on August 3, 1976, subsequent to the filing of the complaint, rules and regulations were submitted to Congress.

17. The Commission denies the allegations of paragraph 17, on the grounds that on August 3, 1976, subsequent to the filing of the complaint, the Commission gave final approval to a set of rules and regulations and submitted them to Congress.

18. The Commission admits the allegations of paragraph 18, except to state that the words of the statute are not that it may not put into effect rules and regulations disapproved under the statute but that it may not prescribe such rules and regulations.

19. The Commission denies that it has or will modify proposed rules and regulations to give incumbent candidates for Congress an advantage over non-incumbent candidates for Congress and, while agreeing that it consulted with and will consult with Members of Congress and members of the staff of Congress on the substance of regulations, denies that it writes those rules and regulations to conform with what its members perceive to be the desires and wishes of Members of Congress.

20. The Commission denies that the Act and Subtitle H of the Internal Revenue Code deprive plaintiff of any rights

under the United States Constitution as alleged in paragraphs 20 through 23 of the complaint.

WHEREFORE, the Commission states that this Court has no jurisdiction over this action and that no relief can be had upon the allegations of the complaint and respectfully submits that this Court should accordingly dismiss the complaint and deny any relief.

Respectfully submitted,

/s/ John G. Murphy, Jr.
JOHN G. MURPHY, JR.
GENERAL COUNSEL

/s/ William Oldaker
WILLIAM OLDAKER

/s/ Charles N. Steele
CHARLES N. STEELE

Federal Election Commission
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Washington, D.C. 20463
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

[Dated September 2, 1976] Civil Action No. 76-1227

AMENDED ANSWER OF FRANCIS R. VALEO,
SECRETARY OF THE SENATE

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, defendant Francis R. Valeo, Secretary of the Senate

amends the first sentence of paragraph 14 of his Answer, served the 23rd day of August, 1976, to read as follows:

> 14. For answer to the allegations in paragraph 14, defendant Valeo denies that said allegations accurately state the events referred to therein, and denies, on information and belief, that office accounts usually consist in part of excess campaign funds and that Senator James Buckley "himself has an office account" or had at that time an office account covered by such proposed regulation. * * *

Respectfully submitted,

/s/ Cornelius B. Kennedy
Cornelius B. Kennedy
Kennedy, Webster & Gardner
888 17th Street, N.W.
Washington, D.C. 20006
(202) 298-8208
Attorneys for Francis R. Valeo
Secretary of the Senate

Dated: September 2, 1976

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

[Dated September 3, 1976] Civil Action No. 76-1227

ORDER

This case came before the Court on September 2, 1976, on plaintiffs' motion to certify certain constitutional questions to the Court of Appeals, pursuant to 2 U.S.C. § 437h

(a). Upon consideration of the arguments of counsel, the complaint and answers thereto, the extensive requests for admissions and responses thereto, the stipulation of all parties, the briefs filed prior to oral argument on this matter, and the full record herein, and it appearing to the Court that there are no genuine issues with respect to the facts necessary for certification, it is, by the Court, this 3rd day of September, 1976,

ORDERED, that plaintiffs' motion for certification of certain constitutional questions be, and the same hereby is, granted; and it is

FURTHER ORDERED, that the following constitutional questions immediately be, and the same hereby are, certified to the United States Court of Appeals for the District of Columbia, pursuant to 2 U.S.C. § 437h(a):

> 1. Does this action challenging the constitutionality of § 315(c) of the Federal Election Campaign Act (FECA), 2 U.S.C. § 438(c), and §§ 9009(c) and 9039(c) of Subtitle H of Internal Revenue Code of 1954, 26 U.S.C. §§ 9009(c) and 9039(c), present a justiciable case or controversy under Article III of the United States Constitution?
>
> 2. Do 2 U.S.C. § 438(c), and 26 U.S.C. §§ 9009(c) and 9039(c), which allow a single House of Congress to disapprove rules and regulations, or selected portions thereof, adopted by the Federal Election Commission, violate the principles of separation of powers and checks and balances established by Articles I, II, and III of the Constitution; are they in derogation of the Presidential veto power in Article I of the Constitution; and are they in excess of the legislative powers enumerated in Article I of the Constitution?

3. Do the challenged provisions specified in questions one and two violate the right of a candidate for Federal office to Due Process of Law under the Fifth Amendment of the United States Constitution by: a) depriving him of the right to have laws affecting him enacted by the full legislative process, including passage by both Houses of Congress with the opportunity for a Presidential veto; and, b) invidiously discriminating against him in allowing incumbent officeholders, but not challengers, to veto rules and regulations of the Commission?

4. Do the challenged provisions violate the Constitution by delegating the discretion to disapprove regulations of the Federal Election Commission to a single House of Congress without fixing any standards or criteria to govern the exercise of such discretion and without requiring any statement of reasons for the exercise of such discretion?

5. Do the challenged provisions, by allowing a single House of Congress to disapprove rules and regulations, or selected portions of such rules and regulations, adopted by the Federal Election Commission, create an extra-Constitutional legislative process in [violation of Article I?]

And it is

FURTHER ORDERED, that the attached "Stipulation as to Findings of Fact," which is incorporated by reference herein, be, and the same hereby is, certified to the Court of Appeals as this Court's findings of fact necessary for certification; and it is

FURTHER ORDERED, that the Clerk of the District Court shall deliver forthwith to the Clerk of the Court of Appeals the record in the above-captioned action.

/s/ Charles R. Richey
Charles R. Richey
United States District Judge

Date: September 3, 1976

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

[Dated: Sept. 3, 1976] Civil Action No. 76-1227

STIPULATION AS TO FINDINGS OF FACT

The parties herein jointly stipulate to the following facts for the purposes of this litigation:

PARTIES

1. On July 1, 1976, plaintiff Ramsey Clark filed this action seeking declaratory and injunctive relief regarding certain provisions of the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431, *et seq.*, as amended, (hereinafter the "FECA") and Subtitle H of the Internal Revenue Code of 1954, 26 U.S.C. §§ 9001, *et seq.*, as amended, (hereinafter "Subtitle H") and against their administration and enforcement by defendants. The complaint alleges and the defendants deny that these provisions, which provide that the defendant Federal Election Commission ("Com-

mission") may prescribe regulations if the appropriate body of Congress does not disapprove such regulations within thirty legislative days after transmittal to Congress, violate the constitutional doctrine of separation of powers and destroy the constitutional system of checks and balances established by Articles I, II and III of the United States Constitution and deprive plaintiff Ramsey Clark of Due Process of Law under the Fifth Amendment of the United States Constitution.

2. Plaintiff Ramsey Clark is an individual eligible to vote in the 1976 election for the office of President of the United States.

3. The plaintiff Clark is a candidate for the Democratic Party nomination for United States Senator from the State of New York in the primary election scheduled for September 14, 1976.

4. In the primary for the Democratic nomination for Senator, plaintiff Clark is opposed by, among others, Bella Abzug, a sitting Member of the United States House of Representatives.

5. As a Member of the House of Representatives, Ms. Abzug is authorized to vote, has voted and will continue to have the opportunity to vote on any resolution to disapprove regulations of the Commission affecting elections for the United States Senate, when they also affect elections for United States President, Representative or Resident Commissioner.

6. Representative Abzug is not a member of any Committee of the House of Representatives to which proposed regulations of the defendant Commission, to the extent that they are referrable to the House, are or will be referred. Unless a resolution of disapproval of any such

regulations is reported to and made the pending business of the House of Representatives, Representative Abzug is not authorized to and cannot vote on whether to disapprove such regulations.

7. Mr. James Buckley, a sitting Member of the United States Senate from the State of New York, is the candidate of the New York State Conservative Party in the general election for the Senate seat which he presently holds, and is also a candidate for the Republican Party nomination for the Senate seat which he presently holds.

8. As a Member of the Senate, Mr. Buckley is authorized to vote, has voted, and will continue to have the opportunity to vote on any resolution to disapprove regulations of the Commission when they affect elections to the United States Senate.

9. Senator Buckley does not serve on any Committee of the Senate to which regulations of the defendant Commission, to the extent that they are referrable to the Senate, are or will be referred. Unless a resolution of disapproval of any such regulations is reported to and made the pending business of the Senate, Senator Buckley is not authorized to and cannot vote on whether to disapprove such regulations.

10. The winner of the Democratic Party nomination for United States Senator from the State of New York will oppose Senator Buckley in the general election.

11. The United States, plaintiff-intervenor herein, join plaintiff Clark in seeking a declaration of the unconstitutionality of the one-house veto procedure contained in 2 U.S.C. § 438(c)(2), (c)(4) and 26 U.S.C. §§ 9009(c)(2), (c)(4) and 9039(c)(2), (c)(4), alleging, *inter alia*, that the challenged provisions permit evasion of the Presidential

veto requirements, are in derogation of the legislative powers enumerated in Article I of tne Constitution, and violate the constitutional principle of separation of powers as embodied in Articles I, II, and III of the United States Constitution.

12. Defendant Francis R. Valeo is the duly elected Secretary of the United States Senate whose duties include furnishing certain services and facilities to, and cooperating with, the Commission in carrying out the Commission's duties. 2 U.S.C. § 483(c)(2) [sic]. He is also custodian for the Commission of certain reports and statements submitted pursuant to rules and regulations prescribed by the Commission. 2 U.S.C. § 438(d)(1). Defendant Valeo is an *ex officio* Member of the Federal Election Commission. 2 U.S.C. § 437c(a)(1).

13. Defendant Edmund L. Henshaw, Jr., is the duly elected Clerk of the United States House of Representatives whose duties include furnishing certain services and facilities to, and cooperating with, the Commission in carrying out the Commission's duties. 2 U.S.C. § 438(d)(2). He is also custodian for the Commission of certain reports and statements submitted pursuant to rules and regulations prescribed by the Commission. 2 U.S.C. § 438(d)(1). Defendant Henshaw is an *ex officio* Member of the Commission. 2 U.S.C. § 437c(a)(1).

14. Defendant Commission was established by § 208(a), Pub. L. 93-443, 88 Stat. 1280, and reconstituted by 2 U.S.C. § 437c. In addition to defendants Valeo and Henshaw, who are *ex officio* members without a right to vote, the Commission is composed of six voting members appointed by the President of the United States, by and with the advice and consent of the Senate. 2 U.S.C. § 437c.

THE STATUTORY FRAMEWORK

15. The Commission is empowered to prescribe regulations to carry out the provisions of FECA and the functions and duties imposed on it by Subtitle H. 2 U.S.C. §§ 438(a)(10), 438(c) and 438(d) and 26 U.S.C. §§ 9009 and 9039.

16. All regulations are initially drafted by the Commission's staff based on, *inter alia*, the statutes, their legislative history, and comments received from the public. All regulations are then published in the Federal Register for public comment. Thereafter, comments are received both in public hearings, when held, and in written submissions. Regulations are then discussed at public Commission meetings, and subsequently redrafted in the light of those discussions and subsequent comments received, and resubmitted for further Commission deliberation. This process continues until the Commission finally approves regulations.

17. Before any such regulation may be put into effect, the Commission must transmit to the Senate or the House of Representatives, as the case may be, a statement setting forth the proposed regulation and a detailed explanation and justification of it. 2 U.S.C. § 438(c)(1) and 26 U.S.C. §§ 9009(c)(1) and 9039(c)(1).

18. Statements concerning regulations dealing with required reports or statements by a candidate for the office of Senator, and by political committees supporting such a candidate, must be transmitted to the Senate. 2 U.S.C. § 438(c)(3).

19. Statements concerning regulations dealing with required reports or statements by a candidate for the office of Representative, Delegate, or Resident Commissioner,

and by political committees supporting such a candidate, must be transmitted to the House of Representatives. 2 U.S.C. § 438(c)(3).

20. All other statements must be transmitted to both the House of Representatives and the Senate. 2 U.S.C. § 438(c) and 26 U.S.C. §§ 9009(c) and 9039(c).

21. If within thirty legislative days after receipt of such a statement, a body of the Congress disapproves any regulation, or any portion thereof which the body determines to be a single separable rule of law, then the Commission may prescribe any regulation not disapproved and may not prescribe any regulation, or portion thereof, which has been disapproved. 2 U.S.C. § 438(c)(2), (c)(4) and 26 U.S.C. §§ 9009(c)(2), (c)(4) and 9039(c)(2), (c)(4).

CONGRESSIONAL DISAPPROVAL: OFFICE ACCOUNTS REGULATIONS

22. On July 30, 1975, the defendant Commission, pursuant to 2 U.S.C. § 438(c), referred to both the House of Representatives and the Senate proposed regulations relating to the disclosure of contributions to and expenditures from office accounts of federal office-holders, and making such contributions and expenditures subject to the limitations of 18 U.S.C. §§ 608, 610, 611, 613 through 617. These sections of the Criminal Code were later stricken from Title 18 and inserted in the Federal Election Campaign Act, as amended, at 2 U.S.C. §§ 441a - 441j. Pub. L. 94-233.

23. Office accounts were defined in the proposed regulations as accounts used to support the activities of a federal office-holder, but not including franking accounts

and funds appropriated by the Congress for legislative activities. (40 Fed. Reg. 32951).

24. Some Members of Congress have in the past put excess campaign funds into office accounts and the proposed regulations were designed in part to require the reporting of such funds.

25. On August 1, 1975, Senator Stevens, and Senator Johnston and five other Senators, including both the majority and minority leaders, noted that in their judgment "the proposal clearly conflicts in many important ways with the Congressional intent in authorizing constituent services accounts under the FECA" and requested an extension of 15 days for the comment period, since most Members of Congress were away during the intervening period. Congresswomen Mink and Holtzman made similar requests for extensions.

26. On August 5, 1975, the same regulations were published in the Federal Register for public comment before September 4, 1975 (40 Fed. Reg. 32951).

27. On August 8, 1975, Wayne Hays, Chairman of the House Administration Committee to which the proposed regulations had been referred, wrote the Commission indicating that in his view the Commission should complete review of its proposed regulations in light of public comment and any public hearings before submitting them to Congress.

28. On August 22, 1975, the Commission extended the time for public comments and scheduled public hearings on the regulations for September 16 and 17, 1975.

29. At the public hearings, testimony totalling 200

pages of transcript was received from eight witnesses; in addition, several written comments were received.

30. The regulations were redrafted by the Commission after receiving public comments and requests for guidance, including 22 requests from Members of Congress, as to how the new campaign law affected office accounts.

31. On September 30, 1975, after receiving public comment, the defendant Commission referred a second version of the same regulations to both the House and the Senate.

32. The letters of transmittal and the explanation and justification transmitted with the regulations are the Commission's statement of the reasons for the Commission's regulations.

33. Public hearing on the first and second versions of the regulation were held by the Committee on Rules and Administration of the United States Senate on October 2, 1975.

34. On October 6, 1975, the Committee submitted Senate Resolution 275 to disapprove both regulations, accompanied by a report, with dissenting views. (S. Rep. No. 94-409, 94th Cong., 1st Sess.)

35. On October 8, 1975, when the resolution was before the Senate, an amendment was offered the effect of which would have been to approve the second version of the office account regulation. The Senate by a single vote rejected the amendment. Senators voting against the amendment included Senator Buckley. Following the vote on the amendment, the Senate by voice vote agreed to the resolution as submitted (121 Cong. Rec. 17888 (daily ed. Oct. 8, 1975)).

CONGRESSIONAL DISAPPROVAL OF DOCUMENT-FILING REGULATIONS

36. On August 1, 1975, defendant Commission sent to both the House and the Senate regulations providing for the filing of original copies of all campaign reports and statements with the Commission before transmittal to the House and the Senate as a means of compliance with the statutory requirement that such reports and statements "shall be received by the Clerk of the House [and the Secretary of the Senate] as custodian[s] for the Commission." 2 U.S.C. § 438(d)(1)(A) & (B).

37. On August 6, 1975, the Commission published the document-filing regulations in the Federal Register for public comment before September 5, 1975 (40 Fed. Reg. 33169).

38. The Chairman of the Commission, Thomas Curtis, met in early October 1975, with the Chairman of the House Administration Committee, Representative Wayne Hays, to discuss, *inter alia*, the document-filing regulations.

39. Discussions were held between August 1, 1975 and October 22, 1975, between representatives of the Commission and representatives of the House Administration Committee on the document-filing regulations.

40. On October 22, 1975, the House of Representatives, by House Resolution 780, disapproved by a vote of 257 to 148 the document-filing regulations. (121 Cong. Rec. 10185-98 (daily ed. Oct. 22, 1975)).

41. Representative Abzug voted to disapprove the regulations (121 Cong. Rec. 10197 (daily ed. Oct. 22, 1975)).

OTHER 1975 REGULATIONS

42. On December 2, 1975, a second version of the document-filing regulations (H. Doc. No. 94-314, 94th Cong., 1st Sess.) and a third version of the office accounts regulations (H. Doc. 94-313, 94th Cong., 1st Sess.) were transmitted to both the House and the Senate. Additional proposed regulations were transmitted to Congress by the Commission on December 3, 1975, and January 19, 1976.

43. In connection with the various regulations that the Commission proposed in 1975, comments and testimony were received and considered from Members of Congress, counsels for the National Committees of the major political parties, business and labor groups and representatives of State committees, various "public interest" groups and the public at large.

BUCKLEY V. VALEO AND 1976 FECA AMENDMENTS

44. At the time the Supreme Court issued its decision in *Buckley v. Valeo*, (Nos. 75-436 and 437) on January 30, 1976, neither the House nor the Senate had taken action to disapprove any of the regulations described in paragraph 42, above, nor had thirty legislative days expired.

45. The Commission decided, after the decision in *Buckley v. Valeo*, that, even though the thirty legislative days had passed since the regulations were submitted to Congress and no resolution of disapproval had been passed, it would be inappropriate for the Commission to prescribe any regulations prior to Congressional action on bills then pending to reconstitute the Commission as an independent agency.

46. On May 11, 1976, the Federal Election Campaign Act Amendments of 1976 (Pub. L. 94-283, 90 Stat. 475) were enacted. They require, *inter alia*, that regulations approved by the Commission before it was reconstituted by the enactment of the 1976 Amendments would become operative only in the event that they were thereafter transmitted to the Senate and House, as appropriate, and that neither the Senate nor the House took action disapproving such regulations within thirty legislative days following their submission to the Congress.

47. On May 11, 1976, President Ford signed the Federal Election Campaign Act Amendments of 1976 and made certain comments with respect thereto which appear at 12 Weekly Comp. of Pres. Docs. 857 (1976).

REGULATIONS UNDER AMENDED FECA AND SOLICITATION OF VIEWS BY THE COMMISSION

48. On May 26, 1976, the Commission published comprehensive proposed regulations in the Federal Register governing such matters as disclosure of contributions, limitations on both contributions and expenditures, corporate and union political activity, office accounts, matching funds to candidates in presidential primaries, convention financing, and issuance of advisory opinions and compliance procedures (41 Fed. Reg. 21572).

49. Publication of the proposed regulations was the culmination of preliminary drafting by the Commission's staff during which copies of the proposed drafts, while not formally published for the public, were widely distributed. Copies were placed in the Commission's library where they were available to the public, drafting meetings

were open meetings in the Commission's hearing room, and copies were distributed, not only to the Commissioners, including the *ex-officio* members, and the staff, but to interested members of the public.

50. The Commission purchased 5,000 reprints of the Federal Register containing the proposed regulations and distributed them to the public. Of those, over 400 were sent to all persons who had testified, submitted comments, or requested information on the 1975 regulations; over 200 were sent to other persons who had contacted the Commission on official business in 1975, *e.g.*, by requesting advisory opinions; over 1,600 were distributed in response to public requests for them by mail; 2,000 were sent to the Public Records Offices of the Senate and the House for distribution there, and the remainder were distributed by the Commission's Public Records Office to individuals who asked for them there.

51. In addition, the Commission staff answered over the telephone through its information services and legal advice services, approximately 1,200 requests for information about the regulations.

52. The Commission held twelve seminars throughout the country as part of its ongoing program to contact the public about the election laws, between the initial publication of the regulations and their final adoption, at which the regulations were discussed by Commissioners and members of both the Staff Director's office and the General Counsel's staff. Copies of the proposed regulations were made available at these meetings both by the Commission and various groups which reproduced them and the problems uncovered by the drafting process were discussed and suggestions were invited.

53. Public hearings were held on June 7, 8, 9 and 10 on the proposed regulations, resulting in 263 pages of testimony from 45 witnesses. In addition, in connection with the public hearings, 28 submissions, containing over 360 pages of comments were received.

54. Briefing sessions were held by members of the General Counsel's staff in early June 1976 for members of the Congressional staffs to explain the regulations and to solicit comments on them.

55. Briefing sessions were also held for other interested groups.

56. Individual Commissioners or senior staff members attended at least six meetings scheduled by various groups interested in election law at which the regulations were discussed and comments were solicited.

57. The Commission solicited public comment until Monday, June 14, 1976 (41 Fed. Reg. 21572).

58. Public comment was in fact received and considered until the Commission approved the final regulations in late July, prior to their submission to the Congress.

FEC'S TENTATIVE APPROVAL OF REGULATIONS

59. Beginning on June 17, 1976, the regulations drafted by the Commission staff were the subject of formal discussions at Commission meetings. Commission meetings on the regulations were held on: June 17, 1976, June 21 through June 25, 1976, June 29 through July 1, 1976, July 6 through July 10, 1976, July 21, 1976, July 29, 1976, and July 30, 1976.

60. Copies of the revised drafts discussed at the agenda meetings were routinely made available to the public by various methods. Copies were placed in the Commission library. Copies of the agenda items were routinely distributed to the Democratic and Republican National Committees as well as to Congressional offices and other groups which had expressed interest in receiving them, *e.g.*, the AFL-CIO, the NAM and the Chamber of Commerce. Karen Fling, the editor of Plus Publications' "Campaign Practices Reports" was routinely supplied with the agenda items, attended the Commission meetings, and discussed the proposed regulations in the "Campaign Practices Reports." Similarly, William Hurst of the CCH Federal Election Campaign Financing Guide received agenda material for use in that publication. Copies of the regulations were distributed for persons attending the agenda meetings. Approximately 30 press requests were filled for copies of the regulations, including regular requests from specific reporters as well as AP, UPI, the New York Times, the Washington Post and the Washington Star.

61. By the end of the week ending Friday, June 25, 1976, defendant Commission had considered all of the regulations drafted by the staff governing disclosure, contribution and expenditure limitations, independent expenditures, compliance procedures, advisory opinion procedures, and office accounts. In its consideration the Commission reached tentative decisions as to which sections had been approved, which sections needed redrafting, and which sections would have to be considered further. Transcripts of relevant portions of the June 25th meeting, among others, will be submitted to the court as expeditiously as possible.

62. These decisions of the Commission permitted those regulations to be cited as representing the Commission's

present understanding of the law in answers to requests for opinions from the public on the effect of the Federal Election Campaign Act of 1971, as amended, on the election campaigns then in progress. In addition, the Commission continued to consider changes in the regulations, both those suggested by the staff on the basis of its realization that sections needed clarification and revision and those suggested on the basis of outside comments. The Federal Election Campaign Act Amendments of 1976 required all previous opinions to be codified as rules and regulations within 90 days of May 11, 1976 (Pub. L. 94-283, Section 108(b)). Opinions given expressly noted that the regulations had not yet been adopted by the Commission, and that the answers given were therefore based on the Commission's interpretation of the meaning of the provisions of the law and not on the regulations.

PROCEDURES LEADING TO COMMISSION'S FINAL ADOPTION OF 1976 REGULATIONS

63. At a meeting held on July 8, 1976, the Commission staff specifically suggested to the Commission that if it "wanted to indicate some preliminary approval, that language indicating preliminary approval could be inserted in the letters we're sending out, based on these proposed regulations in the form of opinions, information letters."

64. The record of that meeting also reflects that the discussions with staff personnel from the two Congressional committees, scheduled as part of the drafting process, could not be held until July 21st, after the recess for the Democratic National Convention. Accordingly, the Commission did not transmit to Congress the regulations it had tentatively approved until after meeting with the staffs of the Congressional Committees. Relevant portions

of this transcript will be submitted to the court.

65. Thereafter, on the afternoon of July 27, 1976, members of the staffs of the Commission and the House Committee on House Administration met to discuss these regulations and possible revisions.

66. On the morning of July 28, 1976, the staff of the Commission met with the staff of the Senate Committee on Rules and Administration to discuss these regulations, and to solicit comments and suggestions about them.

67. On Thursday, July 29, and Friday, July 30, 1976, defendant Commission met to consider suggested amendments to its proposed regulations.

68. At these meetings, amendments were considered, some of which were passed.

69. Some of the proposed amendments related to suggestions made by the staffs of the respective Congressional committees, and some of these were passed.

70. The revisions to the regulations proposed by the staff included ones that were entirely unrelated to suggestions made by the staffs of the respective Congressional committees.

71. The suggested revisions were formally proposed by the staff of the Commission, under the direction of the General Counsel of the Commission.

72. The General Counsel did not concur with all of the recommendations made by the staffs of the Congressional committees and those not agreed with were therefore not recommended by him to the Commission.

73. Some revisions proposed by the General Counsel were rejected by the Commission.

74. One of the amendments adopted at these meetings modified the office accounts regulations, so that reports would have to be filed no more often during election years than during other years (twice), and so that the reporting date for office accounts would differ from that for other reports.

75. At the July 29th meeting, the staff indicated to the Commission that various objections had been voiced by Congressional staff members in the meetings, including the objections that (1) having office accounts due on the same date as the October 10 quarterly report for political campaign funds was burdensome and might result in having those reports confused with the campaign fund reports, and (2) requiring reports four times a year in election years would result in an unequal, greater, burden for House members than for Senate members since House members would have to report five times in two years, whereas Senators would only have to report nine times in six years.

76. The Commission decided at the end of the discussions to change the reporting dates from April 10 to April 15 and from October 10 to October 15, and to require reports in all years – election and non-election – to be filed on those twice-yearly dates.

77. During the meetings of July 29 and July 30, 1976, the Commission gave the regulations final approval, as modified.

78. Earlier, on June 25, 1976, the Commission had, after a drafting process like that described for other reg-

lations, published proposed regulations governing presidential general election financing in the Federal Register for public comment in connection with public hearings to be held on July 7, 1976 (41 Fed. Reg. 26396). These regulations govern only the funding for the presidential general elections under Subtitle H. Final Commission approval of these regulations occurred in time to submit them to Congress with the other regulations described in the previous paragraphs.

TRANSMITTAL OF 1976 REGULATIONS TO CONGRESS

79. On August 3, 1976, the proposed regulations approved by the Commission were transmitted to both the House and the Senate to give them the opportunity to disapprove them any time during the next thirty legislative days.

80. On August 25, 1976, these regulations were published in the Federal Register (41 Fed. Reg. 35931), and reprinted with the Commission's explanation and justification as H. Doc. 94-573, 94th Cong., 2d Sess. (1976).

81. As of the date of these findings, the thirty legislative days have not yet expired as to the regulations presently pending before the Congress.

Respectfully submitted,

/s/ Larry P. Ellsworth
Larry P. Ellsworth
Attorney for Plaintiff Ramsey Clark

/s/ Alexis Panagakos
Alexis Panagakos
Attorney for Plaintiff-Intervenor
United States of America

/s/ Cornelius B. Kennedy
Cornelius B. Kennedy
Attorney for Defendant
Francis R. Valeo

/s/ Eugene Gressman
Eugene Gressman
Attorney for Defendant
Edmund L. Henshaw, Jr.

/s/ Charles N. Steele
Charles N. Steele
Attorney for Defendant
Federal Election Commission

Dated: September 2, 1976

FEDERAL ELECTION COMMISSION

COMMISSION MEETING OF JULY 8, 1976 – PARTIAL TRANSCRIPT

Tape #4A

Chairman Thomson: Is there anything further on 100 to 108? (pause) Very well, we'll move to Part 111 – Compliance. And we'll start around the table as we did in 100 to 108.

Commissioner Harris: Shouldn't we have some accounting, Mr. Chairman, as to what we do about 108 at this point, I mean a – is that adopted for transmission or where are we?

Chairman Thomson: Well, we have – you brought in anything to be added to your master?

General Counsel Murphy: Yes sir. The – I would not recommend to the Commission that you use in any of these sections more than what might be styled preliminary approval at this point, since our discussions with the staff people on the Hill may very well lead to proposals in which I would concur and bring to the Commission as a recommendation or this Commission may wish to take up on its own. Any final adoption up to this point would accordingly be subject to another final adoption, and that seems to me not the best procedure. On the other hand, if you wanted to indicate some preliminary approval, that language indicating preliminary approval could be inserted in the letters we're sending out, based on these proposed regs in the form of opinions, information letters.

Chairman Thomson: Well, I think you're right, but I'm beginning to wonder at what date we'll get any input from the Hill. The House staff has gone to the convention, as I understand it.

Commissioner Tiernan: Well, it's my understanding that they are reviewing these regulations now, Mr. Moss and –.

Chairman Thomson: Moss has gone to the convention.

Commissioner Tiernan: I mean Moss has gone, but Russ –.

Chairman Thomson. Isn't Eddie there? I hope so.

Commissioner Tiernan: Yeah, and Doug Patton and some of the others. The Minority Counsel is also participating.

General Counsel Murphy: I'm sure Cooper is with them.

Commissioner Tiernan: Cooper, yeah.

General Counsel Murphy: The – as we understand, the

earliest that they'd be prepared to sit down with us, however, is the 21st.

Commissioner Aikens: (inaudible) . . . on page three on this proposal?

General Counsel Murphy: Yeah, that's in Part 110. We'll get there tomorrow.

Chairman Thomson: If we have to wait 'til the 21st to have them sit down with us, we aren't going to get these up there until August.

Commissioner Tiernan: Mr. Chairman, I think there's no question we would like to get on with this as soon as possible, but I think in just this review that we've been making, indicates, you know, in the haste to get them up there, we may be doing a disservice to the Commission. And as anxious as all of us are to get them before the Congress, I would – I would be one that would want to make sure that we thoroughly review these even after the staff generally had some consultation with the House members and the Senate, whatever way they're going to do it, but still not rush these regulations through because, we've spent a great deal of time already on them, and I think another week or so isn't going to make make [sic] a difference. I know the time schedule, Jack, that you have is to get it in line before the election, but on the other hand if we get it up there and we find that we've missed something, I'm sure even if we take up another week, we still may miss something.

General Counsel Murphy: Well, it's an extraordinarily complex series of documents.

Commissioner Tiernan: – We're dealing with a hell of a lot of regulations. And your staff, I'm sure has tax on them.

General Counsel Murphy: That's a good part of the detail.

Vice Chairman Harris: Mr. Chairman, could I ask something on this? We've got the explanation and justification. That refers to Parts 100 to 105, 109 to 111, but it's attached to 100-108. See right at the back of –.

General Counsel Murphy: It's – there has to be some kind of a typo, Commissioner Harris because if you look at the text, it goes from 100 through 108, and does not refer to 109. I suspect that what happened Carol Binette who handled the major portion of the typing of this, was doing 100 to 108 at one point the same day she turned out 111 and put a cover sheet on it. The 105 is merely a typo.

Vice Chairman Harris: Pardon me, 100 to 108?

General Counsel Murphy: Yes, and strike the one – and 109 through 111.

Chairman Thomson: Does the Commission desire to express any degree of approval on the – 100 to 108? Do you want to give it preliminary approval?

Vice Chairman Harris: Semi – semi-final.

Commissioner Aikens: Semi-final.

General Counsel Murphy: I think I'd like for you to authorize in preparing letters to insert language that what I'm saying to whoever is getting letters is based on the regulations' preliminary approval, approved by the Commission – that gives it a little edge of belief.

Chairman Thomson: Well, do you want to vote on preliminary approval or do you want to approve it by unanimous consent? If no objection, the Part 100-108 receives preliminary approval by the Commission by unanimous consent.

Now we'll proceed with Compliance Procedure – Part 111.

Commissioner Staebler: Before you leave the subject of when things are going to get looked at, would any part of this get any attention before the twenty-first?

Chairman Thomson: Well, Bob says that some of the boys up there are looking at it now or will be looking at it.

Commissioner Tiernan: It's my understanding that Doug Patton and Russ and Cooper who is the new or on the minority staff of the House Administration, worked on this yesterday or last night or sometime afterward. And they've been doing it and they made some indications of areas that where there are some – there being some difficulties, but I think they may be explainable by meetings with the staff people as to what was the intention of the language. There may be some areas that will not be subject to being resolved by them and our staff. There may be a question that Jack will have to present to us in the sense that, well, you know, that there is alternatives and we'll have to make a decision at that point.

Commissioner Staebler: The twenty-first then becomes – is significant for what occasion?

Commissioner Tiernan: The date that, I think the Chairman or Mr. Murphy suggested as – for final approval and was not so you can get them up to the Hill.

Chairman Thomson: No, the date Jack says that the staff on the Hill would be willing or ready to sit down and talk about them, am I right?

General Counsel Murphy: Yes sir. Now it may be that that's the first time that Bob Moss is free, and in the meantime, we may be able to have some discussions with Russ

and Tom Cooper. We could certainly try that.

Harriet Robnett: And what are you, presuming you'll meet with the Senate Rules Committee staff at the same time?

General Counsel Murphy: Yes, although I'm sure Ed Hall is getting awfully sick of this subject.

Harriet Robnett: I know, I understand, but I, nevertheless, think that might.

General Counsel Murphy: Oh sure, absolutely, absolutely. No, the delay is occasioned by the House Administration staff. Yes, presence at the convention.

Commissioner Tiernan: So what would be your projection, the twenty-second, assuming that's if we meet with Moss and them or not.

General Counsel Murphy: It would very much depend on whether they have many or only few problems, and –.

Commissioner Tiernan: The few problems, then you could bring in on the following Thursday?

General Counsel Murphy: Well, that's a Wednesday.

Commissioner Tiernan: Oh, that's a Wednesday?

General Counsel Murphy: I think that's a Wednesday.

Chairman Thomson: It is, the 19th is Monday.

General Counsel Murphy: It's conceivable we could iron out – we could iron out –.

Commissioner Tiernan: We could have it on Tuesday or Monday.

General Counsel Murphy: Wednesday and Thursday, I'll have the material circulated to the Commission Thursday afternoon for action Friday, that's possible. And then transmission after final typing will be Monday or Tuesday. That may be optimistic, but that seems to be possible. (pause)

Chairman Thomson: Are you ready with one one one (111)?

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption omitted in printing]

[Dated: January 21, 1977] Civil Action No. 76-1227

JUDGMENT

This three-judge court was convened according to 28 U.S.C. § 2284, pursuant to 26 U.S.C. § 9011(b) as to matters within the purview of Chapter 95 of Subtitle H of the Internal Revenue Code of 1954, including the challenged review provision, § 9009(c), and pursuant to 28 U.S.C. § 2282* as to matters within the purview of Chapter 96, including challenged review provision § 9039(c). The complaint herein was in effect bifurcated, and referred both to the Court of Appeals en banc pursuant to 2 U.S.C. § 437h, and in part to this three-judge court.

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* Since repealed, section 2282 was in effect at the time this suit was instituted and applies to it. See Clark v. Valeo, ____ F.2d ____ (1977).

The portion of the claim referred to this three-judge court concerns plaintiffs' prayer for a declaratory judgment respecting, and an injunction restraining the operation of, two legislative review provisions of Subtitle H, §§ 9009(c), 9039(c), above, on grounds of repugnance to the Constitution of the United States.

This Court has considered the evidence submitted, the findings of fact made by the District Judge to whom the request for a court of three judges was presented, the briefs and oral arguments of counsel. In accordance with the judgment of the United States Court of Appeals for the District of Columbia Circuit dismissing the complaint referred to that Court en banc,, and the opinions in support thereof, this date filed in No. 76-1825, Clark v. Valeo, ____ F.2d ____ (1977),

It is, this 21st day of January, 1977,

ADJUDGED AND ORDERED by this Court that this action be and hereby is dismissed and that this three-judge court is hereby dissolved.

/s/ J. Skelly Wright
J. Skelly Wright
United States Circuit Judge

/s/ Harold Leventhal
Harold Leventhal
United States Circuit Judge

/s/ Charles R. Richey
Charles R. Richey
United States District Judge

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1105

RAMSEY CLARK,

Appellant,

v.

J. S. KIMMITT,
Secretary of the United States Senate;

EDMUND L. HENSHAW, JR.,
Clerk of the United States House of Representatives;

and

FEDERAL ELECTION COMMISSION,

Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

MOTION OF J. S. KIMMITT, SECRETARY OF THE UNITED STATES SENATE, TO DISMISS, AND BRIEF IN OPPOSITION TO CERTIORARI

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Pursuant to Rule 16 of the Rules of this Court, appellee J. S. Kimmitt, Secretary of the United States Senate, respectfully moves this Court to dismiss the appeal for want of jurisdiction under 2 U.S.C. § 437h(b).

Treating the jurisdictional statement (hereinafter "J.S.") as a petition for *certiorari* as required by 28 U.S.C. § 2103, appellee files his brief in opposition to *certiorari.*

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit with concurring and dissenting opinions (Jurisdictional Statement Appendix II, 1-119 (hereinafter "J.S. App.")) has not yet been reported.

JURISDICTION

The judgment of the court of appeals returning all certified questions to the district court unanswered with instructions to dismiss the case was entered on January 21, 1977 (J.S. App. II, 1-18). The notice of appeal was filed in the court of appeals on February 7, 1977 invoking the jurisdiction of this Court under 2 U.S.C. § 437h(b). See discussion of jurisdiction under Motion to Dismiss, *infra,* p. 8. A jurisdictional statement was filed on February 9, 1977, accompanied by a motion to expedite the proceedings before this Court. That motion was denied by this Court on February 22, 1977.

QUESTIONS PRESENTED

Appellant brings to this Court as questions presented only the certified constitutional questions which were returned unanswered by the court of appeals to the district court with instructions to dismiss the case for lack of ripeness and because of judicial prudence. Since certified questions are limited to questions concerning the constitutionality of provisions of the Federal Election Campaign Act, and those questions were not considered by the court of appeals, the questions presented by this appeal are:

1. Whether jurisdiction exists for this appeal under 2 U.S.C. § 437h(b), which provides for appeal to this Court only of questions of constitutionality of the Federal Election Campaign Act certified under Section 437h(a), where the court of appeals returned all certified questions to the district court unanswered, expressly limited its decision to the determination of the justiciability issues of ripeness and judicial prudence, and instructed the district court to dismiss the case.

2. Whether the court of appeals was correct in its determination that appellant had not presented a ripe justiciable "case or controversy" which would permit that court to reach and decide the merits of the constitutional questions respecting a unicameral veto of Federal Election Commission regulations.

3. Whether, under the circumstances of this case, appellant's challenge to the statutory provisions providing for legislative review has been mooted by the expiration of the review period without any action of legislative disapproval.

STATUTE INVOLVED

The Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431, *et seq.*,[1] and, in particular, Section 437h, which provides as follows:

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[1] By letter dated February 10, 1977, to the Clerk of the Court, appellant revised his jurisdictional statement to appeal "solely from the judgment of the court of appeals." Appellant does not seek review, therefore, of the order of the district court under Subtitle H of the Internal Revenue Code of 1954, as amended, 26 U.S.C. § 9001 *et seq.*, and the provisions of the statute are not involved in this appeal.

"§ 437h. Judicial review

(a) The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting *en banc.*

(b) Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

(c) It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a)."

STATEMENT

Proceedings Below

Appellant, then a candidate for nomination of the Democratic Party to run for United States Senator from New York, commenced this action to obtain declaratory and

injunctive relief against operation of provisions in the Federal Election Campaign Act of 1971, as amended (hereinafter the "FECA"), governing legislative review of rules, regulations and advisory opinions of the Federal Election Commission (hereinafter "the Commission"). Simultaneously with the filing of the complaint, appellant moved for certification of appellant's certified questions testing the constitutionality of certain provisions of the FECA.

The motion was opposed by the Commission and the Secretary of the Senate, the only two defendants served at that time, on the grounds, *inter alia,* that for lack of standing and ripeness appellant had failed to present a justiciable case or controversy as required by Article III.

In an order filed August 13, 1976, the district court concluded that it would not decide the Article III standing and ripeness issues which already had been put forward by the defendants, and,

> "FURTHER ORDERED, that, although the Court will not rule upon any motion to dismiss with respect to the Article III ripeness and standing issues, defendants may file such a motion with the Court, on or before August 18, 1976, with said motion being served upon all parties on the same date . . . ."

All defendants filed such further motions to dismiss, asserting, among other grounds, that the case did not present a ripe justiciable case or controversy. In their answers, all appellees also asserted the absence of a justiciable case or controversy.

Thereafter, on September 3, 1976, the district court, having declined to rule on the standing, ripeness and other

justiciability issues raised by the appellees, granted appellant's motion to certify certain constitutional questions to the court of appeals.[2] The district court pointed out in an accompanying Explanatory Memorandum to the Court of Appeals *En Banc* which it filed with its order that at the hearing on August 13, 1976, "the court rejected the defendants' major contention in opposition to certification and the convening of a three-judge court, *to wit*, that certification would be improper until the court determined whether plaintiff had presented a case or controversy within the meaning of Article III of the United States Constitution."

On the same day, September 3, 1976, the court of appeals ordered that the matter was "preliminarily deemed to have been properly certified" to that court and that

> "[A] hearing will be held on September 10, 1976 at 2:00 p.m., on the certification. The parties having addressed these questions in their presentations to the District Court, such expedition should not be unduly burdensome, and, it is therefore
>
> FURTHER ORDERED that all briefs upon the matters to be argued on Friday, September 10th shall be filed no later than the close of business, Wednesday, September 8, 1976."[3]

[2] The Department of Justice, as the United States, sought and was granted permission to intervene on behalf of the President and Executive branch as a plaintiff-intervenor (J.S. App. II, 3-6) to argue for a judicial determination that the one-House veto provisions in the FECA are unconstitutional. (J.S. App. I, 26a.) It joined in this motion (J.S. App. I, 52a). However, the "United States" has not noted an appeal or otherwise sought review of the judgment of the court of appeals ordering the district court to dismiss the case.

Pursuant to the order of the court of appeals, all of appellees briefed and argued before the court of appeals on September 10, 1976, the questions which they had addressed in their presentations to the district court on the certification, including the Article III issues of standing and ripeness. However, because the September 3, 1976 order of the court of appeals was limited to questions on the certification which the parties had addressed in their presentations to the district court and, under the certified constitutional question procedure of Section 437h(a) the issue on the merits of the certified questions was not before the district court, the appellees did not address either the district court or the court of appeals on the merits. No further briefs or argument were ordered by the court of appeals, which, on January 21, 1977 issued the order which is now before this Court returning the certified questions to the district court unanswered with instructions to dismiss the case on the ground of lack of ripeness and judicial prudence.

During the time this case was pending before the district court and the court of appeals, the only event which took place under the challenged statutory provision was the commencement of the required 30-day lying-over period for legislative review of the Commission's proposed regulations. The Congress adjourned *sine die* on October 1, 1976 before the termination of this period without taking any action of disapproval of the proposed rules. On October 5, 1976, the Commission issued a statement, distrib-

[3] See J.S. App. I, 10a.

uted as a press release, to advise candidates and the public generally that even though the proposed regulations had not been formally prescribed, they represented the Commission's formally adopted views as to the meaning of the FECA and the Commission would enforce the statute in accordance with that interpretation. On January 12, 1977 the proposed regulations were resubmitted to the 95th Congress, and on March 29, 1977 the period for legislative review expired without Congress having taken any action of disapproval. On April 5, 1977, the Commission announced in a press release that the proposed regulations had been placed on the Commission's agenda for April 7, 1977 for a vote on whether or not to prescribe them.

MOTION TO DISMISS

The Decision of the Court of Appeals Was Limited to Justiciability and Is Not a Decision Appealable Under Section 437h(b).

As provided by Rule 16(1)(a), an appeal which is not taken in conformity to statute is subject to a motion to dismiss on the ground that the appeal is not within the jurisdiction of this Court. Appellant has brought this appeal under 2 U.S.C. § 437h(b). However, there is no basis for an appeal to this Court under 2 U.S.C. § 437h(b). That provision limits appeals to this Court to matters certified under Section 437h(a). Section 437h(a) provides that only "questions of *constitutionality of this Act*" (emphasis added) may be certified to the court of appeals by the district court. (J.S. App. III, 30.) Thus, appeals to this Court under Section 437h(b) are specifically limited to questions of the constitutionality of the FECA.

To meet the test of Sections 437h(a) and (b), the decision of the court of appeals sought to be appealed must be a decision on the *constitutionality* of the FECA. However, the court of appeals did not make such a decision. It concluded only that "the matter before us does not present a ripe 'case or controversy' within the meaning of Article III" (J.S. App. II, 10), and returned all certified questions unanswered to the district court with instructions to dismiss the case for lack of ripeness and because judicial prudence dicated abstention.[4] (J.S. App. II, 16-18.)

A decision limited to justiciability and judicial prudence issues by the court of appeals cannot be converted by the appellant into an appeal to this Court under the statutory provisions of 2 U.S.C. § 437h(b). Plainly, questions of the constitutionality of provisions of the FECA do not include ripeness and similar issues of general justiciability.[5] Appellant's argument that the court of appeals decision on ripeness represents a decision on the first certified question, so as to give this Court jurisdiction on appeal under Section 437h(b) (J.S. 3), is violative of the requirement

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[4] The court of appeals said that were it to decide the threshold "case or controversy" questions differently, "it would nevertheless refuse to reach the merits of the unicameral veto under the doctrine of judicial prudence." (J.S. App. II, 16 n.10.)

[5] Contrary to appellant's contention, Buckley v. Valeo, 424 U.S. 1 (1976) is not precedent for his position urging review on appeal. The consideration of ripeness by this Court in *Buckley* did not relate to the issue of the jurisdiction of this Court on appeal. At the outset this Court determined that at least some of the appellants had a sufficient "personal stake" in a determination *of the constitutional validity of each of the challenged provisions* to present a justiciable "case or controversy." *Id.* at 6-7 (emphasis added). Ripeness was considered by this Court in the context of whether a particular certified constitutional question was ripe for decision in an otherwise justiciable case or controversy.

that certified questions under Section 437h(a) are limited to questions of the *constitutionality* of the FECA. Thus, the only issues before this Court on appeal from the court of appeals decision are justiciability and judicial prudence issues.[6]

The holdings of this Court with respect to direct appeals to this Court from decisions of three-judge courts support the conclusion that this case is not appealable. In such appeals the order appealed must relate to the merits of the constitutional claim, not to an order dismissing a complaint as nonjusticiable. *Cf. Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 101 (1974) (Review of dismissal for lack of standing "is available only in the court of appeals"); *MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975) (A direct appeal under 28 U.S.C. § 1253 to this Court lies "only where such order rests upon resolution of the merits of the constitutional claim presented below"); *Dickson v. Ford*, 419 U.S. 1085 (1974) (An order dismissing a complaint as being nonjusticiable is not appealable under Section 1253). The principles announced by this Court with respect to appeals from three-judge courts should be applicable to the instant case. An appeal from an order dismissing a case solely on ripeness and judicial prudence grounds is not a decision on the constitutionality of the FECA and is therefore not appealable under Section 437h(b).

This appeal, therefore, should be dismissed for lack of jurisdiction.

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[6]The court of appeals noted the lack of a proper record to resolve the important consitutional question on the merits. (J.S. App. II, 16 n.8 and n.10.)

BRIEF IN OPPOSITION TO CERTIORARI

I

The Court of Appeals Correctly Determined That Appellant Did Not Present a Ripe Justiciable "Case or Controversy" Which Would Permit That Court to Reach and Decide the Merits of the Constitutional Questions Respecting Unicameral Veto of Commission Regulations and There Is No Substantial Question for Review.

Treating appellant's appeal as a petition for *certiorari*, 28 U.S.C. § 2103, appellant presents no substantial question for review by this Court. The only issue decided by the court of appeals is that appellant had not presented a ripe justiciable "case or controversy" which would permit that court to reach and decide the merits of the constitutional questions. (J.S. App. II, 16.)

Appellant, however, does not address either that issue or the alternative ground set out by the court of appeals that, were it to have decided the threshold "case or controversy" questions differently, it would nevertheless refuse to reach the merits of the unicameral veto under the doctrine of judicial prudence." (J.S. App. II, 16 n.10.) Instead, appellant argues standing and the merits of the constitutional claims.[7] Neither of these issues was reached by the court of appeals. It stated as to standing that "[w]hile this case presents many novel and thorny jurisdictional

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[7] The Department of Justice argued in the court of appeals that appellant lacked standing to raise this constitutional challenge in his asserted status as a voter. (Brief, pp. 16-17.) It took no position concerning appellant's standing as a candidate, but his standing in that capacity vanished, in any event, when he failed of nomination.

questions under Article III, we believe we need not address those pertaining to standing or political question, because the unripeness of the action is so pervasive" (J.S. App. II, 10); and, as to the merits, it stated "[t]he difficult question whether legislative review of regulations constitutes legislation to which the presidential veto necessarily applies also need not be reached in these proceedings because of the unripeness of a challenge based upon the veto power." (J.S. App. II, 12.)

Appellant has shown no reasons why these conclusions of the court of appeals *en banc* are in error. Furthermore, the Department of Justice, which sought and was granted permission to intervene in the interest of the President and the Executive branch to argue for a judicial declaration of unconstitutionality of the one-House veto provision, has not noted any appeal or otherwise sought review of the court of appeals decision. Thus, *only* appellant seeks review of the constitutional issue on the asserted ground that it is "of concern to both the Executive and Legislative branches, as well as to the public at large." (J.S. 28-29.)

While assuming the role of challenger to statutory provisions which he asserts "fundamentally alter the balance of power in our Government" (J.S. 15) and will "soon undo the whole fabric of the Constitution" (J.S. 33), appellant does not refute the conclusions of the court of appeals that "[a]ny ripe nexus arising out of Clark's position as a senatorial candidate vanished when he failed of nomination"; that as a voter he protested no specific veto action taken by Congress; that he identified no proposed regulation tainted by the threat of veto on review; and that he did not suggest that the facial provisions of the Act inhibit his political activities as a voter in any way. (J.S. App. II, 11.) Instead, relying on this Court's opin-

ion in *Buckley v. Valeo, supra,* at 113-118, appellant contends that there is a "subtle injury *to the separation of powers*" (J.S. 20) (emphasis added) but does not point out that this Court said in *Buckley* only that it has not hesitated to enforce the principles of separation of powers embodied in the Constitution "when their application has proved necessary for the decisions of cases and controversies *properly* before it." *Id.* at 116-17 (emphasis added). Thus, separation of powers may provide a reason in a decision, but it is not a substitute for the requirement of a ripe justiciable "case or controversy." Nor can appellant avoid the requirement for a ripe justiciable "case or controversy" by asserting, without identifying *how he* was injured, that he finds in the mere prospect of legislative review during the pre-submission period an "injury sought to be prevented by invalidation of the veto provision [which] is unlikely to ever be more clearly documented." (J.S. 21-22.) Similarly, the principles in *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 143 (1974) do not support appellant because they require that "the inevitability of the operation of a statute *against* certain individuals" be patent, and appellant does not show how the challenged statutory provision will inevitably operate *against* him. At best, he asserts only that they will operate against the Executive branch and the generalized public interest, and this does not give him standing. *See Warth v. Seldin,* 422 U.S. 490, 501 (1975).

These assertions, however, confirm, rather than destroy, the conclusion that the court of appeals was clearly correct when it determined that "[a]s to plaintiff Clark, we are hard put to find any ripe injury or present 'personal stake' in whether or how rules, regulations and advisory opinions of the Commission are reviewed by the legisla-

ture. . . . On this record . . . we must dismiss his present claim as unripe." (J.S. App. II, 11.)

Furthermore, it is a fact that the 30-day statutory lying-over period to permit Congressional review of the Commission's proposed rules had not expired before the Congress adjourned *sine die* without any action of disapproval by either House of Congress.[8] Thus, the court of appeals correctly relied on *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), where this Court concluded that a lying-over provision which delays the effectiveness of an otherwise valid rule or regulation in order to permit Congress to take negative action is not of itself unconstitutional. *Id.* at 15-16.

Other factors which argue strongly against review of this case on *certiorari* are the inadequacy of the record upon which to review the major constitutional question presented on the merits, and the unresolved questions relating to appellant's standing and to the presence of a political question. The record presents the question on the merits primarily on an abstract level dealing with governmental structure. It lacks the concrete detail showing the requisite personal hardship and the impact and effect of the challenged statutory provision necessary for a full-bodied record. The absence of such essentials should preclude judicial review on *certiorari* in this case.

Finally, the fact that all of the certified *constitutional* questions were returned unanswered by the court of appeals makes review of them on *certiorari* inappropriate because they have not been passed upon by the lower courts. The result of granting a petition for *certiorari* by this appeal would be to require such questions to be determined

[8] In the case of proposed rules submitted to both Houses of Congress, a legislative day does not include any calendar day on which both Houses of Congress are not in session. 2 U.S.C. § 438 (c)(4).

by this Court in the first instance. Given the difficulty of approaching a decision on the constitutional issues because of the absence of a ripe justiciable "case or controversy" necessary to assure an adequate presentation of the issues, the court of appeals, which had the matter under consideration for over four months after the oral argument, correctly decided not to reach the merits of the constitutional questions. These reasons alone justify this Court in declining to review this case under the circumstances in which it is presented.

To take review, on the other hand, would be to "entertain constitutional questions in advance of the strictest necessity" which this Court has pointed out it will not do. *Parker v. County of Los Angeles*, 338 U.S. 327, 333 (1949) (an unripe issue was involved). More recently, in *United States v. Raines*, 362 U.S. 17, 21 (1960), this Court said that the jurisdiction of United States courts is limited by the "case or controversy" requirement to adjudging the legal rights of litigants in actual controversies and that requirement creates the rule for it, "never to anticipate a question of constitutional law in advance of the necessity of deciding it." Indeed, this has been the principle of this Court over many years. *Liverpool Steamship Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885); *Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936); *Bowen v. United States*, 422 U.S. 916, 920 (1975).

Thus, the court of appeals properly held that appellant did not present a ripe justiciable "case or controversy" that would permit the court to reach and decide the merits of the constitutional questions respecting a one-House veto provision which had not been exercised, and this case presents no substantial question for review by this Court on the merits of that provision.

II

Under the Circumstances of This Case, Appellant's Challenge to the Statutory Provisions Providing for Legislative Review of Proposed Rules of the Federal Election Commission Presents No Substantial Question for Review by This Court Because the Statutory Review Period Expired Without any Action of Legislative Disapproval, Permitting the Commission to Promulgate the Proposed Rules.

During the period this case was pending before the court of appeals, the *possibility* existed of a legislative veto of proposed rules submitted by the reconstituted Commission,[9] but no legislative veto occurred. Once the period for legislative review expired, however, there could no longer be a legislative veto of the proposed rules under the challenged statutory procedure. This caused the court of appeals to point out that:

> "If the Commission were to resubmit these same regulations to the 95th Congress, and if the lying-over period expired without any legislative activity, the Commission would then be free to promulgate the proffered regulations, and no presidential prerogative whatever would have been violated. For this reason we hold that this matter is not justiciable on the ground of unripeness with respect to the claim of the United States. Until Congress

[9] The Commission was reconstituted as an Executive branch agency following this Court's decision in Buckley v. Valeo, *supra*, 134-35, that none of the Commission's broad administrative powers, including rule-making and advisory opinions, "can be performed by the present Commission." For that reason, the Commission re-examined its proposed rules previously submitted to Congress and submitted revised proposed rules on August 3, 1976. (J.S. App. I, 65a-72a.)

> exercises the one-House veto, it may be difficult to present a case with sufficient concreteness as to standing and ripeness to justify judicial resolution of the pervasive constitutional issue which the one-House veto provision involves." (J.S. App. II, 15-16 (footnote omitted).)

The situation hypothesized by the court of appeals has now become a reality. The Commission resubmitted its regulations to the 95th Congress on January 12, 1977. On March 29, 1977, the 30-legislative-day lying-over period expired without any action of legislative disapproval. The Commission has announced that it has its proposed regulations on its agenda for April 7, 1977 for a vote on prescribing them.[10] The fate of the Commission's

[10] See Federal Election Commission Press Release, dated April 5, 1977, which reads as follows:

> The Federal Election Commission will act on Thursday (April 7) to officially prescribe comprehensive regulations implementing the Federal Election Campaign Act of 1971, as amended.
>
> The FEC scheduled a vote on official adoption of its formal regulations at its regular Thursday meeting following the completion last week of the 30 legislative day period required by the statute for Congressional review.
>
> The meeting will begin at 10:00 a.m. in the FEC fifth floor conference room.
>
> The regulations were submitted to Congress on Wednesday, January 12. The 30th legislative day, interpreted as a day when both the House and Senate are in session, occurred on Tuesday, March 29. No provision was disapproved by Congress.
>
> The regulations were also submitted to Congress last year, but Congress adjourned after only 28 legis-

(Continued)

proposed regulations is, therefore, fully within the control of the Commission. The only inhibition on the promulgation by the Commission of its proposed rules, the lying-over period for legislative review, which this Court has held in itself not to be unconstitutional,[11] has now expired. With it expired the necessity for deciding whether these rules can be vetoed by one House of Congress.

Appellant, in effect, concedes this point by acknowledging that when this Court held in *Buckley* that the Commission was improperly constituted and therefore could not validly issue any rules, "the necessity for deciding whether such rules could be vetoed by one House of Congress was obviated." (J.S. 6.) Here, the necessity for deciding whether such rules could be vetoed by one House of Congress is also obviated because there is now no inhibition on the Commission prescribing its proposed rules.[12]

Since no act of legislative review under the challenged statutory provision can at this point affect the Commission's power to prescribe the proposed regulations, there is clearly no substantial question ripe for review by this Court.

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[10] (Continued)

lative days had expired. Therefore, the Commission did not vote to formally prescribe the regulations last year. The text of the regulations is found in the August 25, 1976, Federal Register, pages 35932-35976.

[11] Sibbach v. Wilson & Co., *supra.*

[12] The proposed rules were approved by the Commission on April 7, 1977.

CONCLUSION

For the reasons set forth above, this Court should dismiss the appeal for lack of jurisdiction. If the appeal is treated as a petition for *certiorari*, it should be denied because it presents no substantial question ripe for review.

Respectfully submitted,

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Dated: April 8, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1105

RAMSEY CLARK, *Appellant,*

v.

J. STANLEY KIMMITT,
Secretary of the United States Senate,

EDMUND L. HENSHAW, JR.,
Clerk of the United States House of Representatives,

and

FEDERAL ELECTION COMMISSION, *Appellees.*

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

APPELLEE HENSHAW'S MOTION TO DISMISS APPEAL AND BRIEF IN OPPOSITION TO CERTIORARI

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April 8, 1977

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The appellee Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, hereby moves, pursuant to Rule 16(1)(a), to dismiss this appeal as not being "within the jurisdiction of this court, because not taken in conformity to statute." And if the jurisdictional statement then be treated as a petition for certiorari, pursuant to 28 U.S.C. § 2103, the appellee herewith files a brief in opposition to certiorari.

INTRODUCTORY STATEMENT

At the outset, the appellee Henshaw calls this Court's attention to an important development in this case, occuring after the decision of the Court of Appeals on January 21, 1977. It dramatically underscores the correctness of the decision below and further drains from the case any basis or need for this Court's review of that decision.

March 29, 1977, saw the termination of the 30-legislative-day period in which either House of Congress could have disapproved or "vetoed" the full set of rules and regulations proposed by the Federal Election Commission. No such disapproval or veto occurred during that period, thus allowing the Commission to "prescribe" and make effective its rules and regulations in accordance with the relevant provision of the Federal Election Campaign Act, 2 U.S.C. § 438(*c*) (2). To announce this fact, the Commission issued the following press release on April 5, 1977:

> The Federal Election Commission will act on Thursday (April 7) to officially prescribe comprehensive regulations implementing the Federal Election Campaign Act of 1971, as amended.
>
> The FEC scheduled a vote on official adoption of its formal regulations at its regular Thursday meeting following the completion last week of the 30 legislative day period required by the statute for Congressional review.
>
> The meeting will begin at 10:00 a.m. in the FEC fifth floor conference room.
>
> The regulations were submitted to Congress on Wednesday, January 12. The 30th legislative day, interpreted as a day when both the House and Senate are in session, occurred on Tuesday, March 29.

> No provision was disapproved by Congress.
>
> The regulations were also submitted to Congress last year, but Congress adjourned after only 28 legislative days had expired. Therefore, the Commission did not vote to formally prescribe the regulations last year. The text of the regulations is found in the August 25, 1976, Federal Register, pages 35932-35976.

QUESTIONS PRESENTED

1. Where an *en banc* court of appeals has declined, for reasons of unripeness and judicial prudence, to answer all certified questions as to the constitutionality of the "one-House veto" provision of the Federal Election Campaign Act (2 U.S.C. § 438(c)), can an appeal be taken under the section of the Act (2 U.S.C. § 437h (b)) that authorizes appeals to this Court from any decision of the court of appeals "on a matter certified" to it by a district court as to "the constitutionality of any provision of the Act"?

2. Where neither House of Congress has disapproved or vetoed regulations proposed by the Federal Election Commission and where no record has been established as to what the unicameral disapproval device means in practice, other than abstract analysis and speculation,

(a) Is a challenge to the constitutionality of the "one-House veto" device in the Federal Election Campaign Act (2 U.S.C. § 438(c)), as applied to such "non-vetoed" regulations, ripe for judicial determination?

(b) Does the doctrine of judicial prudence preclude a judicial determination in these circumstances?

(c) Do other doctrines of justiciability, such as the absence of standing or the presence of political ques-

tions, preclude a judicial determination in the circumstances of this case?

STATEMENT OF THE CASE

The relevance of the fact that there has been no disapproval or veto by either House of Congress of the Commission's comprehensive regulations is demonstrated by a chronological summary of the way in which this appeal developed. It is a summary that also demonstrates how the proper development of constitutional facts and constitutional issues can be forgotten in the rush to "expedite to the greatest possible extent" proceedings under the Federal Election Campaign Act, 2 U.S.C. § 437h. Cf. *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

July 1, 1976. Appellant filed this suit in the District Court, challenging the constitutionality of the "one-House veto" provisions of the three federal election laws.[1] The complaint sought to enjoin the appellees from "transmitting rules or regulations to any body of Congress" and to compel the appellee Commission "to prescribe rules and regulations upon their adoption by it." App. I, 21a-22a. But at this point, no rules or regulations had been adopted or proposed by the Commission or transmitted to Congress, much less disapproved or "vetoed" by either House of Congress. Nor did the complaint identify any particular proposed rule or regulation that affected or injured the appellant or to which any kind of objection was made.

[1] The constitutional challenge to the "one-House veto" provisions of the Federal Election Campaign Act, 2 U.S.C. § 438(c), was brought pursuant to § 437h in the District Court, which was required "immediately" to certify "all questions of constitutionality of this Act" to the Court of Appeals below, sitting *en banc*.

The appellant also challenged the "one-House veto" provisions of the Presidential Election Campaign Fund Act, 26 U.S.C. § 9009(c), and of the Presidential Primary Matching Payment Account Act, 26 U.S.C. § 9039(c). These Acts have been moved to and codified as Chapters 95 and 96, respectively, of Subtitle H of the Internal Revenue Code of 1954, as amended, and are frequently referred to as the "Subtitle H provisions." Procedurally, the first Act (in Chapter 95) calls for the convening of a three-judge court "to implement or construe any provision of this chapter," followed by a direct appeal to this Court. 26 U.S.C. §§ 9011(b). Appellant's challenge to the second Act (in Chapter 96) was brought under 28 U.S.C. § 2282 (now repealed), since the Act itself has no three-judge court provision.

August 3, 1976. The Commission's proposed comprehensive regulations, following their final adoption by the Commission on July 29 and 30, 1976, were transmitted to both the House and Senate to lie over a period of 30 legislative days.[2] If, during that period, any such rule or regulation were disapproved by either House of Congress, the Commission could not put the rule or regulation into effect.

August 13, 1976. The District Court made what it called a "critical determination" that it should not hear and decide any Article III justiciability issue (including questions as to ripeness), which the appellees had raised in their motions to dismiss, "but should instead certify them, along with the other constitutional questions in this case, to the Court of Appeals."

August 27, 1976. The District Court granted the contested motion of the "United States" to intervene as a party plaintiff, by permission pursuant to Rule 24(b)(2), Fed. Rules Civ. Proc., on behalf of "the entities represented by the United States, namely the

[2] For this purpose, a legislative day is defined as one on which both the House and the Senate are in session. See 2 U.S.C. § 438(c)(4).

President of the United States and the Executive Branch of the federal government."[3] The complaint of the United States, without specifying any particular proposed rule or regulation to which objection was made and without alleging that any "one-House veto" had occurred, sought only a declaration that the "one-House veto" provisions of the federal election statutes "be and are unconstitutional." App. I, 27a.

September 3, 1976. The District Court granted the motion of the appellant Clark, joined in by the "United States," to certify five "certain constitutional questions" that the appellant Clark and the "United States" had proposed. The first such question dealt with the justiciability of this action, while the other four concerned the constitutionality of the "one-House veto" provisions of the federal election statutes in question.[4] None of the parties had addressed to the District Court any arguments or contentions respecting the merits of the four certified "one-House veto" questions, particularly since the District Court had no jurisdiction to answer or resolve such constitutional questions. Moreover, since no legislative veto had been

[3] The District Court in effect denied the main attempt of the "United States" to intervene as of right under Civil Rule 24(a)(1), an attempt grounded on 28 U.S.C. § 2403. The appellees, particularly those representing the House and Senate, also protested that, since the real party in interest was the President, intervention should be in his name and not that of the "United States." All of the appellees, of course, are constituent parts of the "United States."

[4] These five certified questions are repeated as the five "Questions Presented" in appellant's jurisdictional statement before this Court, pp. 5-6. The District Court also certified findings of fact, stipulated to by the parties, in support of the certified questions respecting the "one-House veto."

exercised as to these regulations, the record established in the District Court could not explain or even address that non-existent fact.

September 3, 1976. Less than two hours following the transmission from the District Court of the certified questions, the Court of Appeals *en banc* issued the following order (App. I, 10a-11a):

> ". . . this matter is preliminarily deemed to have been properly certified to this court by the District Court pursuant to § 437h(a), and this court shall proceed to consider the instant matter *en banc*, in accord with precedent established by this Court in *Buckley* v. *Valeo*, 519 F.2d 817 and 519 F.2d 821 (1975), affirmed in part and reversed in part (on other grounds), 424 U.S. 1 (1976). It appearing to the court that plaintiff Clark is a participant in a party primary election for nomination as United States Senator from New York, which election is to be held on September 14, 1976, expedition is required, it is, therefore[5]
>
> "FURTHER ORDERED by the court that a hearing will be held on September 10, 1976 at 2:00 p.m. on the certification. *The parties having addressed these questions in their presentations to the District Court, such expedition should not be unduly burdensome*, and, it is therefore [emphasis added]
>
> "FURTHER ORDERED by the court that all briefs upon the matters to be argued on Friday, September 10th shall be filed no later than the close of business, Wednesday, September 8, 1976. . . ."

[5] It should be noted, however, that neither the appellant Clark nor any other party had ever requested expedition by reason of the imminence of this September 14 primary election. Indeed, almost simultaneously with the issuance of the Court of Appeals order, the appellant Clark was moving to establish an "expedited briefing schedule," under which the initial briefs of all parties would have been due in 30 days.

September 3, 1976. Upon the request of the District Court made on this day, the Chief Judge of the Court of Appeals designated the judges to serve as members of the three-judge court to hear and determine the challenges to the "one-House veto" provisions of Subtitle H of the Internal Revenue Code, 26 U.S.C. §§ 9009(c), 9039(c). Two of these designated judges were also to sit as members of the *en banc* Court of Appeals. Cf. *Buckley* v. *Valeo*, 424 U.S. 1, 9-10, n. 6 ("we need not resolve the jurisdictional ambiguities that occasioned the joint sitting of the Court of Appeals and the three-judge court").

September 8, 1976. On this date, five days after entry of the foregoing order (including the Labor Day weekend), all parties filed their briefs "on the certification." The briefs of the appellant Clark and of the "United States" purported to cover both the justiciability question and the four questions relating to the constitutionality of the "one-House veto" provisions.[6] The appellees, however, read the foregoing order of the Court of Appeals as restricting the parties to those questions already "addressed . . . in their presentations to the District Court." They accordingly limited their briefs to the justiciability matters and the inter-

[6] The brief of the "United States," however, only discussed two of the four certified constitutional questions. It apparently found Questions 3 and 4 unworthy of argument. The brief did argue that the appellant's status as a voter gave him no standing to pursue this case, and that whether he had alleged "a distinct and palpable injury to himself." *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975), was a "novel and difficult issue" that need not be resolved since the intervening complaint of the "United States" raised a justiciable controversy. No position was taken as to Clark's standing in his capacity as a candidate (Brief, pp. 16-17), a status which was to disappear with Clark's defeat in the September 14 election.

vention matters that had already been "addressed . . . in their presentations to the District Court." No effort was made to brief, within this short five-day period, the complex constitutional questions that had only been put into final form by the District Court on September 3, 1976.

September 10, 1976. Oral argument was had before the *en banc* Court of Appeals, sitting together with the three-judge court. Unlike the opposing parties, the appellees made no effort to address the constitutional questions in their oral presentations.

October 1, 1976. The 94th Congress adjourned *sine die* on October 1, 1976, that being the 28th legislative day following the transmission of the Commission's proposed regulations on August 3, 1976. During that period, however, no resolution of disapproval had been introduced in either House and no vote of disapproval or "veto" was in fact taken. Immediately after adjournment, the Commission publicly announced that, although its regulations had not technically become effective, they would be used as "an authoritative guide" to application of the election laws. Thus the administration of those laws was in no way hampered by the congressional adjournment prior to the lapse of the 30-day period. App.II, 15, n.7.

January 12, 1977. The Commission transmitted to both Houses of the 95th Congress the identical rules and regulations that had been proposed and transmitted to the 94th Congress, and the 30-legislative-day period began running anew.

January 21, 1977. The *en banc* Court of Appeals, relying solely on grounds of ripeness and judicial prudence, determined that the certified questions should

be returned to the District Court "unanswered," with directions to dismiss the case. The court expressly reserved decision as to matters of standing and the political question doctrine. App. II, 10. Simultaneously, the three-judge court entered a judgment, in accordance with the Court of Appeals' judgment, that the action before it be dismissed and the three-judge court be dissolved.

February 7, 1977. The appellant Clark filed notices of appeal to this Court from the judgments of both the Court of Appeals and the three-judge court. At no time has the intervening "United States" noted any appeal or otherwise sought review of the judgments of these courts.

February 9, 1977. The appellant Clark, contrary to Rule 15(3), purported to docket both appeals in this Court by filing a single document labeled (1) a jurisdictional statement on appeals from both courts, and (2) a petition for writ of certiorari addressed to both courts. Thereafter, the appellant Clark voluntarily abandoned his appeal from the judgment of the three-judge court and limited the document filed in this Court to a jurisdictional statement on the appeal from the judgment of the *en banc* Court of Appeals.[7]

March 29, 1977. As previously indicated in the Introductory Statement, p. 2, *supra*, the 30-legislative-day period following the resubmission of the Commission's proposed rules and regulations expired on March 29, 1977. During that period, no resolution of dis-

[7] On March 28, 1977, some 65 days after the entry of the three-judge court's judgment on January 21, 1977, the appellant Clark filed what appears to be an out-of-time notice of appeal from that judgment to the Court of Appeals below.

approval was submitted to or voted on by either House. In the absence of such disapproval by either House, the Commission is now free to "prescribe" such rules and regulations in accordance with 2 U.S.C. § 438 (c)(2), which is precisely the ultimate affirmative relief that the appellant Clark has always sought.

STATUTORY PROVISIONS INVOLVED

Section 437h of Title 2, U.S.C., a part of the Federal Election Campaign Act of 1971, as amended, provides as follows:

> § *437h. Judicial review*
>
> (a) The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.
>
> (b) Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.
>
> (c) It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a).

MOTION TO DISMISS APPEAL

The motion of the appellee Henshaw to dismiss this appeal is bottomed on the fact that, in the words of Rule 16(1)(a), "the appeal is not within the jurisdiction of this court, because not taken in conformity to statute." The appeal, in short, has not been "taken in conformity to" 2 U.S.C. § 437h(b), which is the sole statutory authority for this appeal cited in the jurisdictional statement (p. 4).

Section 437h(b) permits an appeal to this Court only as to an *en banc* court of appeals' "decision on a matter certified under subsection (a)." And subsection (a) in turn permits certification only of "questions of constitutionality of this Act."

The critical fact here, however, is that the Court of Appeals expressly declined to render "any decision on a matter certified under subsection (a)," i.e., a matter relating to the "constitutionality of this Act." Instead, the court ruled that the matters "certified under subsection (a)" did not present "a ripe justiciable 'case or controversy' which would permit this court to reach and decide the merits of the [certified] constitutional questions respecting a unicameral veto of Commission regulations." App. II, p. 16. And the court further ruled, in footnote 10 (pp. 16-17) of the opinion, that even if there were a "case or controversy" it would "nevertheless refuse to reach the merits of the [certified question as to the] unicameral veto under the doctrine of judicial prudence." Accordingly, the Court of Appeals returned "the certified questions to the District Court unanswered, with instructions to dismiss." App. II, pp. 10, 16-18.

Such a refusal, on ripeness and prudential grounds, to answer certified questions as to the constitutionality

of the "one-House veto" provisions of the Federal Election Campaign Act simply is not an appealable determination under § 437h(b). That subsection (b) limits this Court's appeal jurisdiction to determinations respecting the constitutionality of some provision of the Act. It does not confer appeal jurisdiction over rulings as to ripeness and judicial prudence—matters entirely unrelated to the constitutionality of any provision "of this Act." Cf. *Gonzalez* v. *Employees Credit Union*, 419 U.S. 90 (1974); *MTM, Inc.* v. *Baxley*, 420 U.S. 799 (1975).[8]

Appellant's claim (J.S. 3) that the Court of Appeals, despite its return of all certified questions "unanswered," did in fact answer the first certified question—which asked whether this action presented "a justiciable case or controversy under Article III"—cannot save this appeal. There is a serious problem whether a question as to justiciability can be or should be certified under subsection (a), since it does not relate to the "constitutionality of this Act" and the appellees so argued below.[9] But that problem aside, subsection (b) plainly does not confer appeal jurisdiction on this

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[8] The *Gonzalez-MTM* doctrine, in defining what kinds of injunctive orders of three-judge courts are directly appealable to this Court under 28 U.S.C. § 1253, holds that an appeal lies "only where such order rests upon resolution of the merits of the constitutional claim presented below." 420 U.S. at 804. Pursuant to that doctrine, this Court has held that an order dismissing a complaint as being nonjusticiable is not appealable under § 1253. *Dickson* v. *Ford*, 419 U.S. 1085 (1974).

[9] Two questions dealing with justiciability were certified and answered by this Court in *Buckley* v. *Valeo*, 424 U.S. 1, 11-12 (1976). But the propriety of certifying such questions was not put in issue in that case. Moreover, there were answers given to other certified questions dealing with the constitutionality of provisions of the Act that were sufficient to sustain an appeal under § 437h(b).

Court to review a decision on a certified matter other than one certified under subsection (a) dealing with "the constitutionality of any provision of this Act." A certified question as to justiciability is not of that stripe.

On February 22, 1977, this Court denied appellant Clark's motion to expedite consideration of these appeal proceedings. The same reasons that justified denial of expedition require that this appeal be dismissed.[10]

BRIEF IN OPPOSITION TO CERTIORARI

This Court is directed by 28 U.S.C. § 2103, where an appeal has been "improvidently" taken from a court of appeals, to regard and act on the papers whereon the appeal was taken as a petition for writ of certiorari. In the event this Court finds that § 2103 is applicable in the circumstances of this defective appeal, the appellee Henshaw urges that certiorari be denied for the following reasons.

1. The Constitutionality of the "One-House Veto" Provisions of the Federal Election Campaign Act Is Not Properly in Issue Before This Court.

The appellant Clark has sought to confront this Court with at least four constitutional questions respecting the "one-House veto" provisions of the

[10] In 2 U.S.C. § 437h(c), Congress has made it the "duty" of this Court to "expedite to the greatest possible extent" the disposition "of any matter certified under subsection (a)." But since only questions as to the constitutionality of some provision of the Act can be certified under subsection (a) and since the Court of Appeals rendered no decision on such certified matters, the expedition command of § 437h(c) is inapplicable. Such was the precise objection made by the appellees in opposing the request for expedition before this Court.

Federal Election Campaign Act. He has done so by resubmitting as "Questions Presented" to this Court all the certified questions that the Court of Appeals declined to answer (J.S. 5-6).

Those constitutional questions are simply not properly in issue before this Court, for they were not addressed or answered by the court below. The fact that they were not answered below is what makes the appeal defective. And that fact also makes review of the merits of those constitutional questions by certiorari entirely inappropriate

In enacting the Federal Election Campaign Act, Congress did not intend to give this Court any kind of original jurisdiction to determine in the first instance questions of "the constitutionality of any provision of this Act." Those questions are to be answered first by the Court of Appeals, and then come to this Court by way of appeal. Congress obviously meant to have this Court review questions as to the constitutionality of this Act only with the assistance of an opinion below that properly addresses and explores the merits of such questions. Yet to grant certiorari to review the constitutional questions left unanswered by the Court of Appeals would indeed force this Court to address these questions in the first instance in violation of the statutory scheme of adjudication, and in violation of some of the fundamental precepts against hasty and unnecessary constitutional adjudication by this Court.

This Court has long warned that it will not "entertain constitutional questions in advance of the strictest necessity." *Parker* v. *County of Los Angeles*, 338 U.S. 327, 333 (1949). See also *Liverpool Steamship Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39 (1885);

Bowen v. *United States*, 422 U.S. 916, 920 (1975). This reluctance to decide the constitutional questions unnecessarily in turn is grounded in the constitutional role of the federal courts. *United States* v. *Raines*, 362 U.S. 17, 21 (1960). Such reluctance, moreover, is particularly strong where the constitutional questions involve the validity of an Act of Congress and where there are other questions that may be dispositive of the case. Here, where the lack of justiciability has been found dispositive, there is no "strictest necessity" that this Court leap to entertain a highly significant and complex constitutional argument that has not been fully developed or explored in the court below. This Court does not reach for "constitutional issues [that] come to us in highly abstract form." *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 575 (1947).

Indeed, the court below in effect found that the constitutional debate that the appellant is so eager to embrace has to date been an "abstract analysis or speculation." App. II, 17, n.10. No adequate record of constitutional facts has been developed; and for a variety of reasons, including the court's own ambiguous order expediting the briefing and oral argument, there has been none of the robust and in-depth adversary confrontation that should precede major constitutional adjudication. Cf. *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976); *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194, 211-213 (1934), and cases cited.[11]

[11] Appellant mistakenly asserts (J.S. 12) that the congressional appellees "declined to submit" briefs on the merits of the "one-House veto" issue in the court below, while later filing *amicus* briefs on that issue in two other cases, *McCorkle* v. *United States*, No. 76-1479 (C.A.4); *Atkins* v. *United States*, Nos. 41-76, 132-76, 357-76 (Ct. Cl.)

What appellant omits to say is that (1) the appellees' decision not to brief major constitutional questions, within 5 days after they had been formulated and certified, was dictated by a fair reading of the Court of Appeals order of September 3, 1976 (see p. 7, *supra*); (2) the congressional appellees were invited by the Court of Claims to file *amicus* briefs in the *Atkins* case after Government counsel conceded at oral argument that the "one-House veto" provision of the Salary Act was unconstitutional; (3) the Fourth Circuit requested copies of these *Atkins* briefs of the appellees at the end of the oral argument in *McCorkle;* and (4) the nature of the constitutional arguments advanced by the appellees in the Salary Act context is significantly different from what they would advance with respect to the "one-House veto" provision of the Federal Election Campaign Act. Cf. the congressional appellees' motions to dismiss or affirm in *Pressler* v. *Blumenthal*, now pending on appeal to this Court, No. 76-1005, another Salary Act case involving a challenge to the "one-House veto" provision (recently repealed) in that Act.

The overriding dictate against resolution by this Court of the "one-House veto" questions is that constitutional litigation can take place in this Court, or in any federal court, only in the context of an Article III case or controversy. Constitutional questions "must be presented in the context of a specific live grievance." *Golden* v. *Zwickler*, 394 U.S. 103, 110 (1969). The decision below has made it clear that there is no such live grievance in this case, a grievance rendered even less live by the fact that no "one-House veto" has been or ever will be cast as to the comprehensive regulations in question. Unless and until that threshold determination is reversed—and there is no reason why it should be—there can be no assurance that this Court could do other than write an abstract advisory opinion on the volatile political subject of "one-House vetoes."

2. The Only Questions Properly Before This Court Concern the Justiciability of This Proceeding.

As demonstrated above, the "one-House veto" questions posed by the appellant are not proper candidates

for review by this Court. The only questions that appellant can bring here on certiorari relate to the matters reflected in the decision below, matters that are encompassed under the broad concepts of justiciability and Article III "case or controversy."

The appellant has posed the justiciability matters in the first of his "Questions Presented" (J.S. 5). He has done so rather inartistically, copying the one question left unanswered by the Court of Appeals that should never have been certified in the first place and then suggesting (J.S. 3) that the court really did decide this justiciability question.[12] Be that as it may, Question 1 does nothing more than bring before this Court the whole gamut of justiciability issues raised before or decided by the Court of Appeals—ripeness, judicial prudence, standing and political question doctrines—all of which this Court would have to address independently in any event. See *Roe* v. *Wade*, 410 U.S. 113, 125 (1973).

These are the issues on which this certiorari case must stand or fall. Certiorari jurisdiction does not depend on whether these issues were certified below or even whether they were all resolved below. What does

[12] The opinion below demonstrates why the justiciability question should never have been certified. Justiciability, of course, is a "threshold" problem in any case and in any court. As the opinion notes (App.II, 7-8, n.2), a District Judge requested to make certification under § 437h "should be free to dismiss for want of jurisdiction, or to permit that question to be decided by this court *en banc*." Obviously, if the District Court may decide justiciability questions, those questions are not properly certifiable. Certified questions, which under § 437h(a) relate only to the validity of provisions of the Act, can never be answered by the District Court. The threshold justiciability questions, in other words, may be decided by either the District Court or the Court of Appeals quite apart from, or as a prelude to, the certification.

matter is whether there is any reason for this Court to review this threshold problem "whether the case before us presents a 'case or controversy' within the meaning of Art. III of the Constitution." *Buckley* v. *Valeo*, 424 U.S. 1, 11 (1976).

That the appellant may believe that resolution of the "one-House veto" problem is important or necessary is not a relevant certiorari consideration. In the present mold of this case, only justiciability matters are in issue, matters that "involve the exercise of judicial restraint from unnecessary decision of constitutional issues." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974). All that this Court can now determine is whether the lower court's exercise of that restraint needs any review by this Court.

3. No Conflict of Decisions or Important Question Arises Out of the Justiciability Ruling Below, Thus Warranting Denial of Certiorari.

The opinion belows rests upon two alternative facets of justiciability: (1) the unripeness of this controversy, App. II, 16, and (2) the doctrine of judicial prudence, App. 11, 16-17, n. 10. See also the concurring opinion of Judge Leventhal, App. II, 36-51.

The appellant has totally ignored the latter point as to judicial prudence. That doctrine, rooted in the discretion of the court applying it, permits the stay of judicial hands when a court determines that a declaration of constitutional or other rights would be imprudent in the circumstances of a given case, for such reasons as the absence of a "full-bodied record." *Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111, 112-113 (1962); *Eccles* v. *Peoples Bank*, 333 U.S. 426, 434

(1948); *Public Service Commission* v. *Wyckoff Co.*, 344 U.S. 237 (1952).

There is no claim here, nor could there be, that the Court of Appeals has in any way perverted or misapplied or abused this discretionary doctrine of judicial prudence. The total absence of any "one-House veto" of the comprehensive regulations in question and the corresponding lack of any proper or full-bodied record of constitutional facts respecting the congressional invocation of this special type of veto power are fully supportive of the use of the judicial prudence doctrine in this case. Why should any court address the constitutional complexities of a widespread legislative device in the absence of a concrete instance of its use? Why should a court address those complexities without any record to assist the court in understanding what the "one-House veto" device means in practice?

The judicial prudence doctrine fully supports the decision below and drains away any need or justification for review thereof. As to the alternative basis for the decision below, the ripeness doctrine, the appellant has likewise asserted no valid reason why the determination should be reviewed. What he does suggest in this connection is either incorrect or irrelevant.

(1) The assertion (J.S. 17) that the decision below "is directly in conflict" with *Buckley* v. *Valeo*, 424 U.S. 1 (1976), will not bear analysis. The "one-House veto" problem was found unripe in *Buckley* solely "[b]ecause of our holding that the manner of appointment of the members of the Commission precludes them from exercising the rulemaking powers in question." 424 U.S. at 140, n. 176. *Buckley* had no occasion to deal with the ripeness of a challenge to the "one-House

veto" provision as applied to rules and regulations submitted by a validly constituted Commission. Thus there can be no conflict between *Buckley* and the decision below as to ripeness, as more fully explained in Appendix A to the court's opinion below. App. II, 20-26.

(2) Appellant, seizing upon certain language in the opinion below concerning his "personal stake" in the "one-House veto" device and his alleged injuries as a voter and candidate (App. II, 11), seeks to elevate this language into a misconstruction of "the test of justiciability under Article III and *Buckley*" (J.S. 19). Such references in the opinion to appellant's standing and injury, however, were not designed to rationalize the express holding of the court that "on this record . . . his present claim is unripe"—a record that revealed the pervasive fact that no legislative veto had ever been exercised with respect to the proposed comprehensive regulations.

Moreover, the court's opinion expressly disavowed any notion that it was addressing or resolving any questions as to appellant's standing or as to any tests of justiciability other than ripeness and judicial prudence. Its disavowal could not have been clearer (App. II, 10):

> "While this case presents many novel and thorny jurisdictional questions under Article III, we believe we need not address those pertaining to standing or political question, because the unripeness of the action is so pervasive."

Thus appellant's asserted misconstruction of "the test of justiciability," related as it is to the issues of

standing and injury not determined by the court, must be disregarded.

(3) Appellant further asserts (J.S. 22) that Congress has somehow directed this Court to exercise the "full extent of its Article III jurisdiction to resolve disputes as to the constitutionality of the election laws" and therefore "the one-House veto issue is ripe for decision by this Court at this time." This contention is frivolous. The "full extent" of this Court's Article III jurisdiction does not include jurisdiction to decide unripe controversies, or to resolve disputes that are otherwise nonjusticiable within the meaning of Article III.

(4) Finally, the appellant mentions (J.S. 13) but does not distinguish this Court's decision in *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941). As the court below noted (App. II, 13), *Sibbach* "stands for the principle that a lying-over provision which delays the effectiveness of an otherwise valid rule or regulation in order to permit Congress to take negative action is not of itself unconstitutional." That is all that has ever happened in this case—two lying-over periods that finally resulted in the final promulgation of the regulations without any negative action by Congress. *Sibbach* thus controls this case up to the point where unripeness makes the whole case nonjusticiable.

In the longer view, the decision below is a careful and responsible application of certain justiciability doctrines to the unique facts of appellant's case. Certainly, the decision below stands as a healthy reminder to those who would challenge the well-established device of the "one-House veto" that constitutional questions "must be presented in the context of a specific

live grievance." *Golden* v. *Zwickler,* 394 U.S. 103, 110 (1969). No further review by this Court is necessary to make that point any clearer than it already is.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed for lack of jurisdiction. Treating the appeal papers as a petition for a writ of certiorari, in accordance with § 2103, certiorari should be denied.

Respectfully submitted,

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April 8, 1977

No. 76-1105

In the Supreme Court of the United States

OCTOBER TERM, 1976

RAMSEY CLARK, APPELLANT

v.

J. S. KIMMITT, SECRETARY TO THE UNITED STATES SENATE, EDMUND L. HENSHAW, JR., CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES, AND FEDERAL ELECTION COMMISSION, APPELLEES

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF THE FEDERAL ELECTION COMMISSION TO DISMISS THE APPEAL AND BRIEF IN OPPOSITION TO CERTIORARI

WILLIAM C. OLDAKER,
General Counsel,
CHARLES N. STEELE,
Associate General Counsel,
Federal Election Commission,
Washington, D.C. 20463.

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Appellee Federal Election Commission, moves to dismiss this case on the ground that the appeal is not "within the jurisdiction of this Court, because not taken in conformity to statute." Rule 16(1)(a). Treating appellant's papers as a petition for a writ of certiorari, pursuant to 28 U.S.C. § 2103, the Commission submits that the petition should be denied.

QUESTIONS PRESENTED

Does Section 314 of the Federal Election Campaign Act provide for appeal of a dismissal of an action for lack of jurisdiction over an Article III case.

Are the issues related to Commission submission of regulations to Congress so clear and substantial that this case warrants review even where no Commission regulation has been disapproved, no court has ruled on the issues, and the court below found no Article III case existed, and ruled that it would have refused in the exercise of judicial prudence to rule on the issues in any event.

STATUTE INVOLVED

The Federal Election Campaign Act, of 1971, as amended, 2 U.S.C. § 431 *et seq.* (P.L. 92–225, P.L. 93–443, P.L. 94–283). Brought into question is Section 314 (formerly Section 315) of that Act, 2 U.S.C. § 437h, which states:

> § 437h. Judicial review
>
> (a) The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.
>
> (b) Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United

> State. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.
>
> (c) It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a).

STATEMENT OF THE CASE

On July 1, 1976, appellant Clark filed complaint in the district court seeking a declaration that the "provisions allowing bodies of Congress to disapprove of regulations adopted by the Federal Election Commission are repugnant to the Constitution * * *"Appellant sought an injunction prohibiting transmission of the rules to Congress and an order directing the Commission to prescribe rules adopted by it (App. Vol. I, pp. 21a–22a). Under 2 U.S.C. § 437h, appellant sought immediate certification to the Court of Appeals of constitutional questions.

Appellant thus sought to bar the Commission from complying with the provisions of 2 U.S.C. § 438(c) for the regulations it was then drafting.[1] Those regu-

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[1] Appellant also simultaneously challenged the transmission to Congress of all rules relating to financing of presidential primary and general elections, pursuant to Chapters 95 and 96 of Title 26, United States Code, by way of applications for a three judge court pursuant to 26 U.S.C. § 9011(b) (Chapter 95) and 28 U.S.C. § 2282 (Chapter 96). Dismissal of the case for lack of ripeness insofar as it relates to these provisions is not presently before this Court, since appellant Clark withdrew the appeal from the three-judge order which he had originally lodged with this Court, and has now filed a notice of appeal from that judgment to the Court of Appeals.

lations, initially published in the Federal Register on May 26, 1976, for comment, were the subject of hearings during June and July of 1976. The Commission's proposed regulations were transmitted to Congress on August 3, and published as the Commission's interpretation of the law on August 25, 1976, Federal Register, pp. 35932–35976. None of the regulations were disapproved by either House of Congress, but when the 95th Congress adjourned on October 1, 1976, thirty legislative days—days when both Houses of Congress were in session—had not yet passed. Accordingly, the regulations were resubmitted to the 96th Congress on January 12, 1977. Thirty legislative days passed on March 29, 1977. On April 7, 1977, the Commission voted to prescribe the regulations.

The Federal Election Commission filed an opposition to plaintiffs various motions, including opposition to the motion for immediate certification on the grounds, *inter alia,* that there was no case or controversy within the meaning of Article III. Oral argument on the motion for immediate certification of three proposed constitutional questions was held before the district court on August 13, 1976.

By order of August 13, 1976, the district court concluded that it should not hear and decide the Article III standing and ripeness issues, but ordered any motions on these grounds to be filed by August 18, 1976. On August 22, 1976, the Attorney General, acting on behalf of the entities represented by the United States, namely, the President of the United States

and the Executive Branch, was permitted to intervene as a party plaintiff, to attack the constitutionality of the challenged provisions. Pursuant to the court's direction, the parties on September 2, 1976, stipulated to facts necessary to decide constitutional questions as then jointly proposed by plaintiff and the United States, as intervenor. By order of September 3, 1976, the court refused to rule on any jurisdictional issues, adopted the stipulated facts as findings of fact, and certified to the court of appeals with minor modifications, the five proposed certified questions.

By order of September 3, 1976, the court of appeals preliminarily deemed the matter properly certified, set an *en banc* hearing on the matter for September 10, 1976, and called for briefs by September 8, 1976, on the certification, noting that "the parties having addressed these questions in their presentations to the District Court such expedition should not be unduly burdensome." Plaintiff and Plaintiff intervenor filed briefs addressing the certified questions. Defendants filed briefs on the arguments presented to the district court relative to the certification procedure under 2 U.S.C. §437h, arguing the impropriety of certification where there was no case or controversy. On January 21, 1977, the court, *per curium,* returned the questions to the district court unanswered, with directions to dismiss because the matter before them "does not present a ripe 'case or controversy' within the meaning of Article III." That court also noted that it would have dismissed the action as a matter of judicial prudence,

even if it had concluded that there was a case within the meaning of Article III.

On February 9, 1977, Ramsey Clark, plaintiff below, docketed in this Court a jurisdictional statement for an appeal. Appellees' time to file their responses to the jurisdictional statement was extended to April 8, 1977.

ARGUMENT

I. THE APPEAL IS NOT TAKEN IN CONFORMITY TO THE STATUTE BECAUSE SECTION 314 OF THE FEDERAL ELECTION CAMPAIGN ACT PROVIDES ONLY FOR AN APPEAL OF A DECISION ON CERTIFIED QUESTIONS OF CONSTITUTIONALITY OF THE ACT NOT FOR APPEAL OF DECISIONS FOR LACK OF JURISDICTION

There has been no decision on matters certified under the review provision contained in Section 314 of the Federal Election Campaign Act of 1971, as amended, which provides for review by appeal to this Court only from a Court of Appeals "decision on a matter certified under subsection (a) of this section." 2 U.S.C. § 437h(b).[2] Subsection (a) provides for actions "appropriate to construe the constitutionality of any provision of this chapter." The court of appeals simply rejected the idea that this action was appropriate for deciding certified constitutional ques-

[2] The 1976 amendments to the Federal Election Campaign Act of 1971 ("FECA") renumbered former Section 315, making conforming changes but leaving it substantively identical to the provision under which this Court reviewed *Buckley* v. *Valeo*, 424 U.S. 1 (1976) P.L. 94-283, Title I, Sections 105, 115, 90 Stat. 481, 496.

tions, ruling that it did not present "a ripe justiciable 'case or controversy' which would permit this court to reach and decide the merits" of the certified constitutional questions. And it added that the action—with its complete lack of a concrete factual setting to illuminate the operation of the challenged statutory provisions—would be inappropriate for examining the delicate problem of whether the checks and balances between the executive and legislative branches have been upset and one allowed to exercise power reserved to the other, even if the necessary ripeness were found to exist.

The clarity of the statute's command that only questions about the constitutionality of substantive provisions demand appellate review by this Court appears from the statutory and historical context of 2 U.S.C. § 437h as well. That provision was offered by Senator Buckley as a substitute for his defeated amendment to abolish the contribution and expenditure limitations. Introducing that amendment, Buckley stated only that it provided

> "for the expeditious review of the constitutional questions I have raised. I am sure that we will all agree that if, in fact, there is a serious question as to the constitutionality of this legislation, it is in the interest of everyone to have the question determined by the Supreme Court at the earliest possible time." 120 Cong. Rec. S. 5207.

The provisions of 2 U.S.C. § 437h were extraordinary provisions designed to test the basic constitutionality

of the Act—not ones designed to provide such extraordinary treatment for ancillary questions of justiciability.

Appellant's argument that the statute envisages direct appellate review by this Court of any decision which was rendered in an action brought under Section 314 is untenable. Appellant argues that this Court's appellate jurisdiction is invoked because the court below "in fact did decide the first question" (Jurisdictional Statement, p. 3)—the Article III question which the district court certified, rather than rule whether there was a case over which it had jurisdiction. Thus, the logic of the position is that the court of appeals' decision that there was no case over which it could exercise jurisdiction within the meaning of Article III of the United States Constitution does not stand between a party and appellate review by this Court. In the Commission's view, there is no support for the proposition that the Congress intended direct appeal to this Court to follow from a single judge's decision, however erroneous, to certify constitutional questions.

Axiomatically, a federal court cannot be given the power to decide a matter which is not a case or controversy, *Muskrat* v. *U.S.*, 219 U.S. 346 (1911); *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240–241 (1937). Thus, had the district court concluded that it could not certify a question because no case or controversy existed, no argument would hold that that determination was itself appealable of right to the

court of appeal *en banc* and then to this Court. The statute itself explicitly provides these special procedures for "all questions of constitutionality of this Act." 2 U.S.C. 437h(a). There is nothing to suggest that the mere assertion of a constitutional claim by a plaintiff mandates *en banc* treatment. And yet here, appellant's assertion that he has a case is postulated as requiring this Court to exercise its appellate jurisdiction.

Appellant cites little support for a proposition so unusual—indeed, unique—in American jurisprudence. Appellant cites no reason that Congress felt direct appeal to the Supreme Court should flow from a single judge's certification of questions. Congress chose for review of the financing of presidential elections the more traditional route for assuring appeal to this Court—the three-judge court. 26 U.S.C. §9010(c); 26 U.S.C. §9011(b)(2). Under that traditional route for direct appeal to this Court from federal court determinations on constitutional questions, no direct appeal would lie. *Dickson* v. *Ford*, 419 U.S. 1085 (1974); *MTM, Inc.* v. *Baxley*, 420 U.S. 799 (1975); *Gonzalez* v. *Employees Credit Union*, 419 U.S. 90 (1974). The statute itself provides the extraordinary protection of *en banc* review by the court of appeals, with no suggestion that it cannot exercise the power clearly placed in the district court to decide that an action is inappropriate for deciding of questions. No statutory history is cited to support the proposition. Virtually the only statutory history of the

provision, quoted above, p. 7 supports the view that the extraordinary review provisions were provided only for serious questions of the constitutionality of substantive provisions of the Act, which would surely be those that the *en banc court* found.

In sum, the Federal Election Commission submits that the decision of a court not to answer certified questions, on such grounds as lack of ripeness and exercise of judicial prudence is simply not an appealable determination under Section 314. Subsection (b) limits this Court's appeal jurisdiction to determinations regarding the constitutionality of some provision of the Act, not to general matters of justiciability.

ARGUMENT

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE UNANSWERED QUESTIONS WHERE THERE IS NO RECORD EVIDENCE PERTAINING TO THE EXERCISE OF THE CHALLENGED POWER, THERE IS NO OPINION OF ANY COURT BELOW UPON THE ISSUES SOUGHT TO BE REVIEWED AND THOSE ISSUES RELATE TO COMPLEX AND SENSITIVE QUESTIONS OF THE RELATIONSHIP OF DELEGATED POWERS TO THE DOCTRINES RELATING TO SEPARATION OF LEGISLATIVE FROM EXECUTIVE POWER

Treated as a petition for certiorari, appellant's papers would seem properly to raise only the issues of ripeness decided by the court below. Appellant, however, never directly addresses his papers to the decision of the court of appeals on that issue, choosing rather to argue to this Court that the ripeness issue is essentially irrelevant by arguing that it is

impossible that any relevant facts could be adduced or arguments perceived by courts or litigants. In effect, appellant essentially argues that immediate decision of the issues raised is so important that this Court should depart from its usual rule of only deciding constitutional questions when an irreducible conflict between parties makes such decisions absolutely necessary. See, e.g., *United States* v. *Raines*, 362 U.S. 17, 21 (1960). The Commission submits that several factors should lead this Court to conclude that it should adhere to that traditional reluctance in this case.

As to the importance of immediate decision, appellant argues that the variety and increase of Congressional review provisions inserted in statutes delegating powers to many different agencies, both independent and executive, over a multitude of different kinds of actions, itself is reason for a declaration of guidance by this Court on the issue. Yet appellant's own papers both admit and demonstrate that there is not a single issue because different statutes raise different issues. Even a cursory glance at the variety of opinions from legislators, administrators, judges and legal scholars confirms the possibility that different considerations will apply to disapproval of different actions by the Congress. (J.S. pp. 28–32). Indeed, while chastizing appellants for not submitting briefs to the court below related to the Pay Act cases, he accepts as tenable the proposition, recently advanced by the present Attorney General (Letter to the President, January 31, 1977), that

Congressional disapproval of Reorganization Act plans is constitutional and raises far different considerations than other disapproval mechanisms. And the comparative similarity of the Pay Act and Reorganization Act statutes, where direct executive action can be reviewed and blocked, in comparison to FECA, where proposed rules of an independent agency are subject to disapproval, highlights the attempt to oversimplify the complex.

In fact, the nub of appellant's argument seems to be that none of these provisions will be illuminated by a factual examination of their exercise. That is, of course, to assume that neither the nature of the action reviewed nor any Congressional statement as to the nature of its disapproval could be relevant. And that is also to say that the nature of the power delegated—whether it is quasi-judicial, quasi-executive, quasi-legislative, or purely administrative—is not relevant. In this analysis, the nature of a Commission rule subject to Congressional disapproval—whether, for instance, it repeated the statute, interpreted more precisely broad terms of the statute or set forth procedural rules—would not be relevant. To the contrary, it is on precisely such factual considerations that the appropriateness of such delegations by Congress to other institutions of government have always turned. See, generally, Jaffe, *Judicial Control of Administrative Action,* Chapter 2 (Little Brown & Co., 1965).[3]

[3] Appellant's characterization that the court below misconstrued this Court's refusal in *Buckley* v. *Valeo*, 424 U.S. 1 137, n. 175 (1976), to consider the Congressional veto problem "due to considerations of ripeness" seems inaccurate. While this Court's reason for not reaching that issue was that it need consider only whether the powers were not exercisable in full by an agency whose members were not appointed in accordance with the Appointments Clause, it specifically let stand the decision by the court of appeals, essentially reaffirmed here, that "the failure of the plaintiffs to present a concrete set of facts in which the court could analyze the nexus between each specific power" and the exercise of the delegated functions made the question unripe for review. *Buckley* v. *Valeo*, 519 F. 2d 829, 896 (C.A.D.C., 1975).

Appellant's ultimate assertion is that the issue of the unicameral Congressional "veto" of Commission regulations is so important and self-evident that this Court should consider the issues raised and attempt to resolve them, despite the lack of consideration by any court below. The extraordinariness of such a request places on appellant a substantial burden of justification. The Commission's regulations have now lain before Congress for the thirty-day period, none have been disapproved, and the Commission has prescribed them, effectuating the ultimate relief sought by appellant in his complaint. Admitting that the election laws are unique, appellant presses this case upon the Court, though the Federal Election Commission, as the agency empowered to enforce the election laws through court actions and consent agreements, and with the aid of policy statements, advisory opinions and regulations, has never addressed the question of the effect upon its powers of the exercise, potential or actual, of a unicameral veto.[4]

[4] Appellant asserts that the Commission "chose" not to brief the issues raised by the Congressional disapproval mechanism before the court of appeals. The Commission read the order of the court below to call only for briefs on the issues addressed before the

In such circumstances, review of this case will not contribute to effective functioning of the Federal Election Commission. Of course, any future regulations of the Commission will be subject to the unicameral disapproval procedure. That Congress may, however, in the future exercise the disapproval power does not make this case an appropriate vehicle for consideration of such complex issues. Should such a case arise, the Commission could address itself before the appropriate forum to the issues raised by a veto and its effect upon the statutory scheme. Resolution of the problems raised by Congressional attempts to provide statutory review over powers delegated should await a case by individuals affected by the exercise of such review.

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district court, and so stated in its submission. The court of appeals, in the four months the matter lay pending before it, never asked for briefs on the constitutional questions.

CONCLUSION

For the reasons stated, this Court should dismiss the appeal as not within the jurisdiction of this Court, because not taken in conformity to statute, and should refuse to issue a writ of certiorari.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1105

RAMSEY CLARK,

Appellant,

v.

J.S. KIMMITT, *et al.*,

Appellees.

REPLY TO APPELLEES' MOTIONS TO DISMISS AND TO THEIR OPPOSITIONS TO CERTIORARI

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Appellees.

REPLY TO APPELLEES' MOTIONS TO DISMISS AND TO THEIR OPPOSITIONS TO CERTIORARI

The motions to dismiss and oppositions to certiorari submitted by appellees are based on unduly narrow views of the judicial review provisions at issue here and of this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). Because of these fundamental flaws in their arguments, appellees' contentions should be rejected and this case set for full argument.

1. In an attempt to limit this Court's appellate jurisdiction, appellees read the judicial review provision of the Federal Election Campaign Act (FECA), 2 U.S.C. § 437h,

in a constricted manner that is wholly unwarranted. Section 437h was, in effect, written on the floor of the Senate where it was adopted as an amendment to assure that this Court would quickly resolve the serious constitutional doubts about provisions such as the one-house veto, which Members of Congress recognized would fundamentally affect our form of Government. 120 Cong. Rec. 10562 (April 10, 1974). Ignoring the purpose of the provision, appellees would have this Court construe the section as if it were a carefully crafted provision of the Internal Revenue Code. Such an overly technical construction is unnecessary and would undermine the intent of Congress to have these constitutional issues resolved immediately. The statement of Judge Learned Hand when he was faced with similar arguments bears full reading:

> The defendants have no answer except to say that we are not free to depart from the literal meaning of the words, however transparent may be the resulting stultification of the scheme or plan as a whole.
>
> Courts have not stood helpless in such situations; the decisions are legion in which they have refused to be bound by the letter, when it frustrates the patent purpose of the whole statute . . . . As Holmes, J., said . . . "it is not an adequate discharge of duty for courts to say: 'We see what you are driving at, but you have not said it, and therefore we shall go on as before. . . .' " Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.) (citations omitted), *aff'd*, 326 U.S. 404 (1945).[1]

In any event, appellees do not seriously dispute the fact that the Court of Appeals actually answered the first constitutional question certified to it -- whether this case presents an Article III case or controversy. Instead, appellees argue that this Court lacks jurisdiction because they disagree with the District Court's decision that this was a certifiable question. However, the Court of Appeals' decision -- that a voter challenging a one-house veto provision does not present an Article III case or controversy -- effectively declares unconstitutional that part of Section 437h(a) giving "any individual eligible to vote" the right to maintain a constitutional challenge to the Election Act. Thus, certified question I *does* raise a question of the "constitutionality of this Act" under Section 437h(a), albeit one raised by the very attorneys hired by Congress to defend, not attack, the constitutionality of the Act. Because the Court of Appeals ruled on this constitutional question

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[1] Appellees' reliance on cases interpreting the jurisdiction of this Court on direct appeals from three-judge courts fails to take into account the FECA's differing statutory scheme and its specific purpose to allow appeals on certified questions from the en banc court of appeals to this Court.

which was properly certified to it, there is a direct appeal to this Court under Section 437h(b).

2. Insofar as the decision below is based on a non-constitutional doctrine of judicial prudence, it flies in the face of the Congressional command of Section 437h that Article III jurisdiction be exercised to its fullest extent. *Buckley v. Valeo, supra,* 424 U.S. at 11-12. Moreover, the lower court's alternative holding -- that Congress cannot command the judiciary to act contrary to the non-constitutional rules of judicial prudence (App. II at 18-19 n.11) -- is not only wholly unprecedented, but directly contrary to a long line of decisions of this Court holding that Congress can by statute overcome non-constitutional justiciability defenses.[2] Whether the Congressional decision to do so was wise public policy is, of course, not a question for judicial review.

3. The decisions of both Houses of Congress not to veto the FEC regulations do not, as appellees have suggested, "dramatically underscor[e] the correctness of the decision below."[3] Rather, they highlight the fact that the injury to appellant occurs even where, as here, use of the veto power is unnecessary because the threat of a veto was itself enough to enable Members of Con-

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[2] *E.g., Warth v. Seldin,* 422 U.S. 490, 514 (1975); *United States v. Richardson,* 418 U.S. 166, 193-96 (1974) (Powell, J., concurring); *Linda R. S. v. Richard D.,* 410 U.S. 614, 617 n.3 (1973); *Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205, 212 (1972) (White, J., concurring); *Sierra Club v. Morton,* 405 U.S. 727, 732 (1972); *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 154 (1970).

[3] *E.g.,* Appellee Henshaw's Motion To Dismiss Appeal And Brief In Opposition to Certiorari 2 (April 8, 1977) (hereinafter "Henshaw Br. ").

gress to secure changes in the FEC's regulations prior to their submission to Congress (Stip. ¶¶ 63-76, App. I at 69a-71a; App. I at 73a-79a; App. II at 54-57, 86-91, 113-15). Just as the President uses the threat of a veto to change legislation, Congress has used the threat of its one-house veto to change FEC regulations. If a criminal aims a gun at his victim's head, he need not pull the trigger in order to obtain the victim's wallet.

4. Although the court of appeals in *Buckley* ruled that the constitutionality of the composition of the FEC was not ripe, this Court decided that legal issue, and it should follow the same approach in this case.[4] In Section 437h Congress has directed the Court to give speedy and certain review to constitutional questions under the FECA, a mandate also dictated by the need for a decision prior to the 1978 elections. The record before this Court is as complete as necessary to resolve this issue. Each party had the opportunity to make the record, and, indeed, appellees were granted the opprotunity, which they exercised only once and then at appellant Clark's request, to supplement the record with certain transcripts (Stip. 61, App. I at 68a; Stip. 64, App. I at 69a-70a). Their present complaints that the record is inadequate -- without pointing to a single missing fact or a single issue of fact which remains in dispute -- is nothing but a smokescreen thrown up

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[4] Moreover, this Court does have the benefit of opinions on the merits by Judge MacKinnon of the Court of Appeals (App. II at 97-109), as well as Mr. Justice White of this Court. *Buckley v. Valeo,* 424 U.S. 1, 282-86 (1976) (concurring).

in an attempt to avoid a constitutional determination on the merits.[5]

CONCLUSION

The decision of the Court of Appeals that the statutory command to resolve this constitutional challenge at the urging of any voter violates the Article III case or controversy requirement raises a substantial constitutional question warranting this Court's plenary consideration. Likewise, the issue of the constitutionality of the one-house veto provision of the FECA, and thus of the legality of the tainted regulations prescribed pursuant to that Act, requires prompt resolution by this Court. All

---

[5] Appellees' explanation for refusing to brief the merits below: (1) neglects to inform the Court that they knew, within hours of the Court of Appeals' Order, that appellant interpreted this Order to include all five certified questions, yet appellees neither revealed to appellant a differing interpretation nor requested a clarification from the Court; (2) fails to explain why the Court would have expedited the case in view of the forthcoming New York primary if a decision on justiciability was all that was contemplated; (3) fails to explain why it was necessary for them to spend several pages of their briefs below defending their decision not to brief the merits; and (4) omits to disclose that the Clerk contacted each attorney by telephone to inform him that the Court's Order requiring briefing was *not* limited to the issues of justiciability. One can thus understand Judge MacKinnon's frustration with appellees' "maneuver," which prompted him to observe that "[t]his is the first instance to my knowledge where a court has elevated such conduct on the part of a defendant into a *jurisdictional* defect" (App. II at 118-19) (emphasis in original).

five certified questions should thus be scheduled for briefing and oral argument.

Respectfully submitted,

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April 14, 1977

No. 76-1105

In the Supreme Court of the United States

OCTOBER TERM, 1976

RAMSEY CLARK, APPELLANT

v.

J. S. KIMMITT, SECRETARY OF THE UNITED STATES SENATE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, Jr.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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CITATIONS

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OPINIONS BELOW

The opinion of the court of appeals *en banc* (J.S. App. II, pp. 1–119) is not yet reported. The order of the district court certifying five questions to the court of appeals (J.S. App. I, pp. 52a–55a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1977. A notice of appeal to this Court was filed on February 7, 1977 (J.S. App. I, p. 10a), and the jurisdictional statement was filed on February 9, 1977. Appellant invokes the jurisdiction of

this Court under 2 U.S.C. (Supp. V) 437h(b). See *Buckley* v. *Valeo,* 424 U.S. 1, 10, n. 6. But see pp. 9–11, *infra.*

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction of this appeal under 2 U.S.C. (Supp. V) 437h(b).
2. Whether this action is ripe for adjudication.

STATUTES INVOLVED

The relevant statutory provisions are set forth at J.S. App. III.

STATEMENT

1. Section 315(c) of the Federal Election Campaign Act of 1971, as added, 88 Stat. 1287, 2 U.S.C. (Supp. V.) 438(c), and amended, Pub. L. 94–283, 90 Stat. 481, 486, prohibits the Federal Election Commission from prescribing regulations without first transmitting to Congress a statement setting forth the proposed regulations and a detailed explanation and justification of them. 2 U.S.C. (Supp. V) 438(c)(1).[1] If within 30 legislative days after receipt of such a statement, either the Senate or the House

[1] Statements concerning regulations dealing with required reports or statements by a candidate for the office of Senator, and by political committees supporting such a candidate, must be transmitted to the Senate. 2 U.S.C. (Supp. V) 438(c)(3). Statements concerning regulations dealing with required reports or statements by a candidate for the office of Representative, Delegate, or Resident Commissioner, and by political committees supporting such a candidate, must be transmitted to the House of Representatives. *Ibid.* Statements concerning regulations dealing with Presidential candidates must be transmitted to both the House and the Senate. *Ibid.*

disapproves any proposed regulation, or any portion thereof that is a single separable rule of law, then the Commission may not prescribe the disapproved regulation or portion thereof. 2 U.S.C. (Supp. V) 438(c)(2). Proposed regulations and portions thereof that are not disapproved within 30 legislative days may be prescribed by the Commission.

Prior to being reconstituted in light of *Buckley* v. *Valeo,* 424 U.S. 1, the Commission had transmitted three sets of regulations to Congress. One was vetoed by the Senate, one was vetoed by the House, and the third set, although not vetoed, was not made effective by the Commission because this Court had held, in the intervening decision in *Buckley,* that the Commission as then constituted lacked the power to issue regulations. 424 U.S. at 140–141.

Following the decision in *Buckley,* the Commission was reconstituted pursuant to the Federal Election Campaign Act Amendments of 1976, Pub. L. 94–283, 90 Stat. 475.[2] On May 26, 1976, the new Commission published for comment comprehensive proposed regulations governing such matters as disclosure of contributions, corporate and union political activity, and office accounts. 41 Fed. Reg. 21572 (J.S. App. I, p.

[2] The 1976 Amendments affected the one-house veto provision in two respects. First, the Amendments make clear that any portion of a proposed regulation constituting a "single separable rule of law" can be selectively vetoed. 90 Stat. 486. Second, the Amendments prohibit the Commission from announcing general rules of law in advisory opinions and require such general rules to be proposed as regulations subject to congressional veto. Pub. L. 94–283, 90 Stat. 482.

65a). The Commission transmitted its proposed regulations to Congress on August 3, 1976 (J.S. App. I, p. 72a). See 41 Fed. Reg. 35932.

2. On July 1, 1976, appellant, who was then a candidate for the New York Democratic nomination for United States Senator (J.S. App. I, pp. 55a–56a), brought this action against the Federal Election Commission and its two *ex officio* members, the Secretary of the Senate and the Clerk of the House of Representatives, challenging the constitutionality of the "one-house veto" provision of the Act and seeking declaratory and injunctive relief.[3]

Appellant alleged that the one-house veto was unconstitutional in several respects (J.S. App. I, pp. 20a-21a). First, he asserted that the one-house veto deprives him of his rights under the separation-of-powers doctrine by purporting to authorize a single House of Congress to disapprove Commission regulations in a manner that denies the President the opportunity to veto such congressional action. Second, he alleged that the challenged provision denies him the

[3] The complaint also challenged the validity of similar one-house veto provisions in Subtitle H of the Internal Revenue Code, 26 U.S.C. (Supp. V) 9009(c) and 9039(c), which apply to regulations promulgated by the Commission with respect to the financing of presidential primary and general elections. The challenge to the Subtitle H provisions was considered by a three-judge district court that sat with the *en banc* court of appeals below. Cf. *Buckley* v. *Valeo*, *supra*, 424 U.S. at 10, n. 6. The three-judge district court adopted the opinion of the court of appeals (J.S. App. I, p. 79a). The district court's judgment dismissing the action was entered on January 26, 1977 (J.S. App. I, p. 10a). Appellant filed a notice of appeal from this judgment to the court of appeals on March 28, 1977.

constitutional right to have laws affecting him enacted by the full legislative process, *i.e.*, passage by both Houses of Congress with the opportunity for a Presidential veto. Third, he asserted that the one-house veto discriminates against non-incumbent candidates, such as appellant then was, by allowing incumbent office holders, but not challengers, to veto Commission regulations. (One of the candidates opposing appellant for the New York Democratic nomination for Senator was then an incumbent member of the House of Representatives; in addition, the then-incumbent New York Senator was a candidate for re-election in the general election (J.S. App. I, pp. 56a–57a).) Fourth, he alleged that the one-house veto provision unconstitutionally delegates discretion to a single House of Congress to disapprove Commission regulations. Appellant also alleged that the Commission "has and will continue to modify proposed rules and regulations to correspond with what its members perceive to be the desires and wishes of Members of Congress, sometimes modifying proposed rules and regulations in such a way as to give incumbent candidates for Congress an advantage in elections over non-incumbent candidates for Congress" (J.S. App. I, p. 20a).

The district court permitted the United States to intervene as a party plaintiff, seeking declaratory relief only (see J.S. App. II, p. 6). The complaint in intervention alleged that the one-house veto provision violated the principle of separation of powers, unconstitutionally permitted the evasion of the Presidential veto requirements, unconstitutionally dele-

gated legislative power to one House of Congress, and purported to endow a single House of Congress with powers outside those specified in the Constitution (J.S. App. I, pp. 22a–27a).

3. Based upon the parties' stipulation of facts, which the district court incorporated as its findings (J.S. App. I, pp. 54a–73a), the district court certified five questions to the court of appeals on September 3, 1976 (J.S. App. I, pp. 53a–54a):[4]

> 1. Does this action challenging the constitutionality of § 315(c) of the Federal Election Campaign Act (FECA), 2 U.S.C. § 438(c), and §§ 9009(c) and 9039(c) of Subtitle H of Internal Revenue Code of 1954, 26 U.S.C. §§ 9009(c) and 9039(c), present a justiciable case or controversy under Article III of the United States Constitution?
>
> 2. Do 2 U.S.C. § 438(c), and 26 U.S.C. §§ 9009(c) and 9039(c), which allow a single House of Congress to disapprove rules and regulations, or selected portions thereof, adopted by the Federal Election Commission, violate the principles of separation of powers and checks and balances established by Articles I, II, and III of the Constitution; are they in derogation of the Presidential veto power in Article I of the Constitution; and are they in excess of the legislative powers enumerated in Article I of the Constitution?

[4] Section 314(a) of the Act, 2 U.S.C. (Supp. V) 437h(a), requires certification of "all questions of constitutionality of this Act."

> 3. Do the challenged provisions specified in questions one and two violate the right of a candidate for Federal office to Due Process of Law under the Fifth Amendment of the United States Constitution by: a) depriving him of the right to have laws affecting him enacted by the full legislative process, including passage by both Houses of Congress with the opportunity for a Presidential veto; and, b) invidiously discriminating against him in allowing incumbent officeholders, but not challengers, to veto rules and regulations of the Commission?
>
> 4. Do the challenged provisions violate the Constitution by delegating the discretion to disapprove regulations of the Federal Election Commission to a single House of Congress without fixing any standards or criteria to govern the exercise of such discretion and without requiring any statement of reasons for the exercise of such discretion?
>
> 5. Do the challenged provisions, by allowing a single House of Congress to disapprove rules and regulations, or selected portions of such rules and regulations, adopted by the Federal Election Commission, create an extra-Constitutional legislative process in [violation of Article I?]

Appellant was defeated in the New York primary election on September 14, 1976, while the case was pending in the court of appeals.

The court of appeals, in a *per curiam* opinion issued on January 21, 1977, held that the case was

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not ripe for adjudication (J.S. App. II, pp. 1–26). The court explained (J.S. App. II, p. 11):

> As to plaintiff Clark, we are hard put to find any ripe injury or present "personal stake" in whether or how rules, regulations, and advisory opinions of the Commission are reviewed by the legislature. Any ripe nexus arising out of Clark's position as a senatorial candidate vanished when he failed of nomination. As a voter Clark protested no specific veto action taken by the Congress and identified no proposed regulation tainted by the threat of veto on review. Nor does he suggest [*sic*] that facial provisions of the Act inhibit his political activities as a voter in any way. It may well be that the facial provisions of the Act, if and when implemented, might in some way inhibit his rights as a voter. On this record, however, we must dismiss his present claim as unripe.

The court held that the government's claim also was unripe because neither House had exercised the power to disapprove regulations by the reconstituted Commission (J.S. App. II, pp. 11–15).[5]

[5] The 94th Congress adjourned *sine die* on October 1, 1976, twenty-eight legislative days after the Commission had submitted its proposed regulations. Accordingly, regulations could not be put into effect prior to the November 1976 election (J.S. App. II, p. 15). The Commission, however, issued a statement that the proposed regulations should be taken as "an authoritative guide" in applying the election law (J.S. App. II, p. 15).

On January 11, 1977, the Commission resubmitted its proposed regulations with several amendments to the 95th Congress. 42 Fed. Reg. 15206. Neither House disapproved any of the proposed regulations within 30 legislative days, and the Commission prescribed them as final regulations effective April 13, 1977. 42 Fed. Reg. 19324.

The court of appeals concluded (J.S. App. II, pp. 15–16) that "[u]ntil Congress exercises the one-house veto, it may be difficult to present a case with sufficient concreteness as to * * * ripeness to justify judicial resolution of the pervasive constitutional issue which the one-house veto provision involved." The court indicated that its holding with respect to ripeness rested on Article III grounds but that even if the constitutional requirements for a case or controversy had been met "it would nevertheless refuse to reach the merits * * * under the doctrine of judicial prudence enunciated in *Samuels* v. *Mackell,* 401 U.S. 66, 73" (J.S. App. II, pp. 16–17, n. 10).

The court declined to answer any of the certified questions and instead returned the questions to the district court with instructions to dismiss the suit (J.S. App. II, pp. 17–18).[6]

DISCUSSION

1. Section 314(b) of the Federal Election Campaign Act, 2 U.S.C. (Supp. V) 437h(b), the statute upon which appellant relies in taking this appeal, provides that "any decision on a matter certified under subsection (a) * * * shall be reviewable by appeal directly to [this] Court * * *." In turn, Section

[6] Judge Wilkey concurred in the result (J.S. App. II, p. 18). Judge Tamm wrote a concurring opinion in which Judges Bazelon and Wright joined (J.S. App. II, pp. 27–35). Judge Leventhal wrote a separate concurring opinion (J.S. App. II, pp. 36–51). Judges Robinson and MacKinnon each wrote separate dissenting opinions (J.S. App. II, pp. 52–82, 83–119).

314(a), 2 U.S.C. (Supp. V) 437h(a), provides for certification by the district court to the court of appeals of "questions of constitutionality of this Act * * *."

The court of appeals did not expressly decide any "matter certified under subsection (a)." To the contrary, the court formally returned all certified questions unanswered to the district court. Appellant contends (J.S. 3), however, that the court of appeals in practical effect answered the first certified question. We agree. The first certified question was whether this action presents "a justiciable case or controversy under Article III of the United States Constitution" (J.S. App. I, p. 53a). The court of appeals' decision that this case is not ripe for adjudication rested upon constitutional, not prudential, considerations. See J.S. App. II, p. 16 and n. 10. Accordingly, the court's holding of unripeness amounted to a negative answer to the first certified question.

That does not, however, end the jurisdictional inquiry. The district court was not empowered by Section 314(a) to certify a question of ripeness to the court of appeals. Ripeness has no bearing upon the "constitutionality of [the Federal Election Campaign] Act," for the Act does not purport to require premature judicial review of its provisions. Thus, insofar as it implicated considerations of ripeness, the question whether this action presents a justiciable case or controversy was improperly certified by the district court.[7] And the issue of ripeness was the only aspect

[7] The question of justiciability did raise an issue concerning the constitutionality of the Act's conferral of standing upon "any individual eligible to vote in any election for the office of President of the United States * * *." 2 U.S.C. (Supp. V) 437h(a). That issue therefore was properly before the court of appeals. But, appellant's suggestion to the contrary (Reply Br. 3–4) notwithstanding, the court did not reach that issue.

of the question of justiciability that the court of appeals decided.

In our view, Congress did not intend to require this Court to exercise appellate jurisdiction when the only issue decided by the court of appeals was one that had been improperly certified to it. Congress intended nothing more than "the expeditious review of the constitutional questions * * *." 120 Cong. Rec. 10562 (1974) (Senator Buckley). Congress did not authorize certification of questions not bearing upon the constitutionality of the Act, and it should not be understood as requiring this Court to decide such questions. Cf. *MTM, Inc.* v. *Baxley,* 420 U.S. 799; *Gonzalez* v. *Employees Credit Union,* 419 U.S. 90. In short, Section 314(b) should be read as permitting review on appeal only of decisions on matters *properly* certified under Section 314(a).

Accordingly, appeal does not lie under Section 314 (b), and appellant's jurisdictional statement must "be regarded and acted on as a petition for a writ of certiorari." 28 U.S.C. 2103.

2. a. The doctrine of ripeness normally reflects prudential as well as constitutional considerations. See generally, Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law,* 69 Mich. L. Rev. 1443 (1971). Appellant argues (Reply Br. 4), however, that Congress, in providing for judicial review in the Federal Election Campaign Act, intended to sweep away all merely prudential restrictions on

justiciability. We do not believe that that is a fair reading of the statute.

The statutory text does not, by its terms, address the issue of ripeness or prematurity. In contrast, the Act, in very broad terms, purports to confer standing on all eligible voters. See note 7, *supra*. That provision led this Court in *Buckley* v. *Valeo, supra,* to conclude that, with respect to questions of standing, Congress had "intended to provide judicial review to the extent permitted by Art. III." 424 U.S. at 12. But the Court made no similar observation with respect to questions of ripeness. Indeed, the Court's discussion of ripeness in *Buckley* treats that issue, as presented there, as turning on prudential and discretionary, not constitutional, considerations. See 424 U.S. at 113–118. Accordingly, we agree with Judge Leventhal, concurring below, that the Act "does not terminate the court's discretion" (J.S. App. II, p. 45) to dismiss an action as premature.

On the other hand, in exercising that discretion the courts must be mindful of the congressional desire for an "expeditious review of the constitutional questions," a desire that permeates the Act's judicial review provisions.[8] We believe that Congress contem-

[8] Upon the filing of a complaint, "[t]he district court immediately shall certify all questions of constitutionality * * *." 2 U.S.C. (Supp. V) 437h(a). Appeal may be taken to this Court from a decision on such questions, but appeal must be brought within 20 days. 2 U.S.C. (Supp. V) 437h(b). "It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of [such matters]." 2 U.S.C. (Supp. V) 437h(c).

plated that only the most forceful prudential considerations would lead a court to dismiss, on grounds of prematurity, a constitutionally justiciable controversy under the Act.

b. Appellant's basic contention in this case is that a legislative veto of regulations proposed by the Commission constitutionally would have no effect and would not bar the Commission from implementing those regulations. That contention, if unaccompanied by any claim of present or imminently threatened injury, would not amount to a case or controversy within the meaning of Article III. See, *e.g., United Public Workers* v. *Mitchell,* 330 U.S. 75, 89–91.

At the time appellant brought this action, the Commission, as reconstituted following the decision in *Buckley,* had not yet transmitted proposed regulations to Congress. Since then, the Commission twice has submitted regulations to Congress, and in neither instance did either House disapprove them. See note 5, *supra.* Final regulations have become effective (*ibid.*), and there is no imminent prospect of even an opportunity for exercise of the legislative veto under the Act. Nor is it inevitable that the one-house veto will be used on some future occasion. Cf. *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 143. A bare claim that a legislative veto would be ineffective therefore would not be ripe for adjudication.

In his complaint, however, appellant alleges that "[b]ecause of the necessity of avoiding a vote of disapproval by a body of Congress, the Commission has and will continue to modify proposed rules and

regulations to correspond with what its members perceive to be the desires and wishes of Members of Congress * * *" (J.S. App. I, p. 20a). In effect, appellant argues that the mere existence of the power of legislative veto can form the basis of a justiciable case or controversy, whether or not that power actually is exercised. We might agree with this argument in a case involving a challenge to regulations already promulgated where a *prima facie* showing had been made that the substance of the regulations had been altered in response to congressional requests. But this case is more doubtful: appellant attacks the Act on its face and makes only unsupported allegations of congressional influence.

In any event, although the question concededly is difficult, we believe that forceful prudential considerations support the court of appeals' holding that this action is not ripe for adjudication. It is fundamental that the federal courts do not "entertain constitutional questions in advance of the strictest necessity." *Parker* v. *County of Los Angeles,* 338 U.S. 327, 333. See generally *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 346–348 (concurring opinion of Mr. Justice Brandeis). Although appellant presents "a purely legal question" (*Toilet Goods Assn.* v. *Gardner,* 387 U.S. 158, 163) that presumably could be adjudicated without the "full-bodied record" (*Public Affairs Associates, Inc.* v. *Rickover,* 369 U.S. 111, 112–113) that Judge Leventhal thought necessary (J.S. App. II, p. 46), there will be no "hardship to

the parties if judicial relief is denied at [this] stage" (*Toilet Goods Assn.* v. *Gardner, supra,* 387 U.S. at 162).

Appellant is not now, and may never be again, a candidate for federal office. If he does become a candidate at some future time, and can then show that the power of legislative veto operates to his disadvantage, he may then litigate the issue; but during the interim he suffers no injury or hardship from the absence of a final determination of the constitutionality of that power. In short, in bringing the present action appellant asks the courts not to resolve a live dispute affecting his current interests but rather to act, as courts historically have declined to do, as "the organ of political theories." *United Public Workers* v. *Mitchell, supra,* 330 U.S. at 91.

3. Neither aspect of the question of ripeness—the appropriate standard to be applied under the Act, or the proper application of that standard to the facts of this case—warrants review by this Court. The court of appeals in fact chose the standard most favorable to appellant. See J.S. App. II, p. 16 and n. 10. The essentially factual question of the correctness of the application of that standard to this case is not a matter of general importance.

The underlying constitutional issue appellant seeks to raise concerning the one-house veto unquestionably is significant. See *Buckley* v. *Valeo, supra,* 424 U.S. at 140, n. 176; see also *Atkins* v. *United States,* Ct. Cl.,

Nos. 41–76, 132–76, and 357–76, decided May 18, 1977.[9] But since that issue is both important and recurring, it is likely to reach this Court soon enough, in a case that does not present difficult threshold isues, such as those of ripeness and standing (see J.S. App. II, pp. 50–51) involved here.

Moreover, the Court should not reach the one-house veto issue in this case in its present posture, even if the Court were to grant certiorari and to conclude that that issue is ripe for adjudication. The only issue decided by the court of appeals was that of ripeness. Should this Court grant certiorari and reverse on that issue, the appropriate disposition would be to remand the remaining issues to the court of appeals for its initial consideration in accordance with Section 314 (a) of the Act. This Court ordinarily does not address issues not decided by the lower court.[10] See, *e.g.*, *Federal Trade Commission* v. *Borden Co.*, 383 U.S. 637, 647. That approach is particularly sound where, as here, the Court has no guidance or assistance from either court below on a constitutional issue of grave proportions. Since it would be inappropriate for the

[9] With respect to that issue, the United States adheres to the position, taken in the district court and the court of appeals, that the legislative veto provision in the Federal Election Campaign Act is unconstitutional. See p. 5, *supra*.

[10] Although this Court decided some issues in *Buckley* that had not been considered by the court of appeals (see 424 U.S. at 118–143), resolution of those issues avoided piecemeal review of the constitutional merits. Here the court of appeals has not decided any of the constitutional questions.

Court to decide the constitutional issue on review here, resolution of that issue properly may await other litigation.

CONCLUSION

The jurisdictional statement should be treated as a petition for a writ of certiorari, and the petition should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1977.

U.S. GOVERNMENT PRINTING OFFICE: 1977

IN THE

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OCTOBER TERM, 1976

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Appellees.

APPELLANT'S SUPPLEMENTAL MEMORANDUM IN RESPONSE TO THE MEMORANDUM FOR THE UNITED STATES

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APPELLANT'S SUPPLEMENTAL MEMORANDUM IN RESPONSE TO THE MEMORANDUM FOR THE UNITED STATES

The Solicitor General, on behalf of the United States, has agreed with appellant that the underlying issue in this case is "significant" and "important," that "the legislative veto provision in the Federal Election Campaign Act is unconstitutional," that this case raises "a purely legal question," and that the one-house veto issue is ripe in the constitutional sense (U.S. Memo 11-15). However, the Solicitor, in a reversal of the position taken by the United States in the courts below, has stated that the case does not meet prudential tests of ripeness because no regulation of the reconstituted Commission has been vetoed (*id.*). Although

recognizing that this position is not free from doubt, he has nonetheless urged the Court not to accept this case because the issue is recurring and it ". . . is likely to reach this Court soon enough, in a case that does not present difficult threshold issues . . . ." (*id.* at 15). Because this unelaborated statement appears to be at the heart of the Solicitor's position, appellant submits this Supplemental Memorandum to demonstrate that the Solicitor's premise, and hence his conclusion, is not supportable.

In fact, this Court cannot reasonably be expected to have another opportunity such as this one to resolve this mushrooming conflict for another two to three years. To our knowledge, there are only four other pending cases which, even tangentially, involve one-house veto issues. Each of these cases has features which makes it an unlikely vehicle for prompt resolution of the issue. The most publicized of these cases is *Atkins v. United States*, Nos. 41-76 *et al.* (Ct. Cl., May 18, 1977). There the Court of Claims, by a four-to-three vote, upheld the particular one-house veto provision found in the Federal Salary Act of 1967, 2 U.S.C. § 359(1) (1970), and dismissed the suit brought by 140 federal judges. Since the United States prevailed in that case, it cannot bring the case to this Court, and even if the judges seek *certiorari* (there is no direct appeal), the *Atkins* case is an unlikely vehicle for authoritative resolution of the one-house veto issue.

On the one hand, the case is of doubtful certworthiness since the Salary Act has recently been amended to eliminate the legislative veto provision. Pub. L. No. 95-19, 95th Cong., 1st Sess. (Apr. 12, 1977). On the other hand, it is highly unlikely that this Court would have to reach the merits even if it accepted the case because, as the United States argued there, the pay increase provisons are probably not severable from the legislative veto provision. Thus,

even if the legislative veto is unconstitutional, plaintiffs are not entitled to the pay increase they seek. This is not to say that the *Atkins* case has no bearing on the need for review in this case, for the Court of Claims' ruling will surely give new impetus to the already vigorous proponents of one-house vetoes in their efforts to include them in pending and future legislation.

The other Pay Act case, *McCorkle v. United States*, No. 76-1479 (4th Cir.), which has not yet been decided, has the same deficiencies as the Judges case – the only difference is that the plaintiffs there are Executive, rather than Judicial, branch employees. The third pending case, *Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp.*, Civ. No. 75-483-P (S.D. Ala., Aug. 20, 1976), *appealed*, No. 76-3712 (5th Cir.), is even less likely to reach this Court. It is a private contract action in which the district court held that the plaintiff lacked standing to raise the tangential one-house veto issue. *Id.* slip op. at 17-18.

The final case is *Chadha v. Immigration and Naturalization Service*, No. 77-1702, in the Ninth Circuit. Mr. Chadha is a deportable alien who applied for and was granted a suspension of his deportation by the Attorney General on the ground of extraordinary hardship. 8 U.S.C. § 1254(c)(1). However, the deportation order was reinstated as a result of a one-house veto of the Attorney General's action. *Id.* at § 1254 (c)(2); H.R. Res. 926, 94th Cong., 1st Sess. (Dec. 12, 1975). Mr. Chadha has appealed directly to the Ninth Circuit, and his deportaton has been automatically stayed.

However, the first brief has not even been filed in that case, and with the significant backlog of cases in the Ninth Circuit, a decision cannot realistically be expected in that case for another year-and-a-half to two years.

Certainly, Mr. Chadha has no incentive to expedite the case, because his deportation will be postponed as long as the case is delayed. Moreover, the Justice Department can be expected to agree that the statute is unconstitutional, so that the Court will probably delay a decision even longer than usual in order to request the views of the House of Representatives and the Senate, as was done in both of the Pay Act cases. If there is a petition to this Court at all, the briefing and argument may add another year before the one-house veto issue will be resolved.

Therefore, the present case presents the only likely vehicle for Supreme Court review of the one-house veto issue in the foreseeable future. This is a powerful reason for taking this case, which the Solicitor admits meets the Article III ripeness test, because a prompt resolution of this issue is vital. Numerous statutes already contain these provisions which allow one House of Congress to dictate Executive actions. Moreover, Congress is threatening to include such provisions in many other important pieces of legislation. For example, the Senate recently defeated a major effort to subject to a one-house veto all of the rules and regulations of the about-to-be-created Department of Energy (123 Cong. Rec. S. 7943-45 (daily ed. May 18, 1977)), and a similar attempt is almost certain to be made in the House which has been the stronger advocate of one-house vetoes. In addition, there is substantial Congressional support for pending proposals to make all rules of all agencies subject to a one-house veto (H.R. 116).

The problem will not vanish. As Congress wisely recognized in providing for expeditious treatment of constitutional challenges to the election laws which are before this Court, it is far better to face the matter now, rather than in a crisis situation at some later date (perhaps under an

energy bill involving billions of dollars), where the consequences may be far more grave and the issues far more difficult. In short, the Congress, the Executive, and, indeed, the Country will benefit from a prompt resolution of the one-house veto issue, and this is the only likely case in which such a resolution can take place.

Respectfully submitted,

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